

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
and	)	
	)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE	)	
COUNCIL, and SIERRA CLUB	)	Magistrate Judge R. Steven Whalen
	)	
Plaintiff-Intervenors	)	
v.	)	
	)	
DTE ENERGY COMPANY, and	)	
DETROIT EDISON COMPANY	)	
	)	
Defendants.	)	

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**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION**  
**TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF**  
**"ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"**

**ISSUE PRESENTED**

Whether this Court should apply EPA's longstanding interpretation of the regulatory exception for "routine maintenance, repair or replacement" because EPA has reasonably interpreted its own regulations

*Plaintiff's answer: Yes*

## **LEADING AUTHORITY FOR THE RELIEF SOUGHT**

### **Statutory Provisions:**

42 U.S.C. § 7411(a)(4)

42 U.S.C. § 7470

### **Cases:**

*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994)

*New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006)

*Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990)

*Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098 (4th Cir. 1985)

*Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)

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By structuring its arguments around catchphrases, DTE presents a false dichotomy and urges this Court adopt one extreme test for assessing routine maintenance claims instead of another. What DTE calls the “routine at the unit” test is *not* EPA’s interpretation, and DTE’s proffered “routine in the industry” test is contrary to the Clean Air Act, regulations, and long-standing EPA guidance.

Rather than focusing on which is the appropriate name for the test—names which have been applied and employed differently by different courts—the United States respectfully asks that this Court directly examine the underlying substantive argument and the statute, regulations, and agency guidance upon which the argument is based. Fundamentally, issue concerns the kinds of things that should be considered when analyzing routine maintenance claims, especially when addressing the “frequency” factor of the established framework for analysis. Under DTE’s view, this Court should be primarily concerned with industry-wide tallies of allegedly similar projects. Under EPA’s longstanding interpretation, whether a project qualifies for the narrow exception in EPA’s regulations for “routine maintenance” should be considered relative to the history and practices of the units at issue as well those of other *individual* units in the industry. Importantly, EPA does not interpret the exception to mean that the practices of the unit at issue should be the Court’s sole concern.

As the D.C. Circuit has definitively held, exceptions to the Clean Air Act’s broad mandate *must* be limited to *de minimis* activities. EPA has always interpreted the routine maintenance exception narrowly, and this Court should defer to the Agency’s reasonable interpretation of its own regulations. DTE’s proposed test would impermissibly expand the routine maintenance exception to cover even unprecedented and costly renovation projects that

cannot fairly be considered *de minimis*. As such, the United States thus respectfully requests that DTE's Motion for Partial Summary Judgment be denied.

## ARGUMENT

### I. DTE'S ARGUMENTS PRESENT A FALSE DICHOTOMY AND CONTRAVENE EPA'S HISTORIC INTERPRETATION

The routine maintenance exception exempts certain activities from the Clean Air Act's broad mandate which imposes NSR requirements on "*any* physical change" that would increase emissions. *New York v. EPA* ("*New York II*"), 443 F.3d 880, 883 (D.C. Cir. 2006). As the D.C. Circuit has now twice held, exceptions to this mandate are necessarily narrow and limited to *de minimis* circumstances. *New York II*, 443 F.3d at 884, 890; *Ala. Power Co. v. Costle*, 636 F.2d 323, 361, 400 (D.C. Cir. 1979); *see also* Plaintiff's Memorandum in Support of its Motion for Partial Summary Judgment ("United States' MPSJ," ECF No. 117) at 8-9.

An agency's ability "to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design." *Ala. Power*, 636 F.2d at 360 (*italics added*). As such, the application of the routine maintenance test must reflect the exception's narrow scope and facilitate the Clean Air Act's purposes. That is exactly how EPA has interpreted this exception for decades, beginning with the 1975 Weyerhaeuser Determination,<sup>1</sup> detailed in EPA's authoritative "Clay Memo,"<sup>2</sup> upheld in the Seventh Circuit's decision in *United States v. Wisconsin Electric Power Company v. Reilly*

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<sup>1</sup> Regional Counsel Opinion, Request for Ruling Regarding Modification of Weyerhaeuser's Springfield Operations (Aug. 18, 1975) (Ex. 3-A to United States' MPSJ, ECF No. 117-5).

<sup>2</sup> *See* Memo from Don Clay (Acting EPA Ass't Adm'r) (Sept. 9, 1988) ("Clay Memo") (Ex. 1); Letter from Lee Thomas (EPA Adm'r) at 3 (Oct. 14, 1988) (Ex. 3-K to United States' MPSJ, ECF No. 117-15) (adopting "*in toto*" the Clay Memo's assessment of WEPCo's routine maintenance claim).



(“WEPCo”),<sup>3</sup> and reiterated in the applicability determination issued to DTE in 2000.<sup>4</sup> Under this longstanding approach—and consistent with the Act’s mandate and the D.C. Circuit’s holdings—routine maintenance must be understood as a “very narrow exclusion” evaluated on a “case-by-case” basis by considering the “nature, extent, purpose, frequency, and cost” of the activity “to arrive at a common-sense finding.” Clay Memo (Ex. 1) at 3; *see also* DTE Determination (Ex. 2) at 2.

Guiding the application of these “WEPCo factors,” is the understanding that “routine” projects are “regular, customary, or standard undertaking[s] for the purpose of maintaining the plant in its present operating condition.” *See* Clay Memo (Ex. 1) at 3-4; DTE Determination (Ex. 2) at 2. For example, in the Clay Memo, EPA assessed the utility’s proposal under the WEPCo factors and noted among other things that the project would involve the replacement of “components that are essential to the operation of” the plant, that the work was not considered “repetitive maintenance” by the companies own documents, and that the project included work items “that would normally occur only once or twice during a unit’s expected life cycle.” *Id.* at 3-6. As such, EPA concluded WEPCo’s projects were “far from” routine. *Id.* at 3. Similarly, in the DTE Determination, EPA evaluated the utility’s proposed project under the multifactor test and determined that the project went “significantly beyond both historic turbine work at Detroit Edison, and what would otherwise be considered a regular, customary, or standard undertaking for the purpose of maintaining” the unit. DTE Determination (Ex. 2) at 2. Importantly, EPA

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<sup>3</sup> 893 F.2d 901, 910-13 (7th Cir. 1990).

<sup>4</sup> Letter from Francis Lyons, (EPA Region V) to Henry Nickel (DTE Counsel, Hunton & Williams) on (May 23, 2000) (DTE Determination) (Ex. 2); *see also United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at \*10 (S.D. Ind. Oct. 24, 2002) (holding the DTE Determination is consistent with EPA’s approach in the WEPCo determinations).

noted that “Detroit Edison ha[d] not provided any information to suggest that [similar projects are] conducted frequently at Monroe or at any other individual utility.” *Id.* at 3. EPA further told the Company that industry practice does not “define routineness,” *id.* at Encl. p. 15, and that the “frequency” factor is assessed based on “whether the change is performed frequently in a typical unit’s life.” *Id.* at Encl. p. 11.

DTE’s motion (ECF No. 116) mischaracterizes EPA’s approach. EPA does not assess whether an activity is routine maintenance *solely* by looking at the unit in question. As noted in the United States’ MPSJ, “information concerning the frequency of similar projects in the lives of other individual units within the same industry can inform the routine maintenance analysis.” (ECF No. 117) at 11; *see also id.* at 11 n.11. Although EPA considers the history and procedures of the unit in question to be those most instructive under its case-by-case approach to evaluating routine maintenance claims, *see United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 856 (S.D. Ohio 2003), EPA has long understood that routine maintenance assessments would contemplate the practices of other, individual generating units throughout the electric industry. *See* DTE Determination (Ex. 2) at Encl. pp. 11, 15; Clay Memo (Ex. 1) at 6 n.2; Letter from Don Clay, Acting EPA Ass’t Adm’r (Feb. 15, 1989) (“Clay Letter”) (Ex. 3-L to United States’ MPSJ, ECF No. 117-16) at 7 n.6; *see also* 57 Fed. Reg. 32,314, 32,326 (July 21, 1992).

While EPA’s decades-old interpretation faithfully implements the Act’s public welfare mandate, DTE’s interpretation, as detailed in the sections that follow, seeks to expand the scope of the exception and frustrate the Act’s public health protections by casting even rare and costly facility overhauls as “routine maintenance.” This Court should defer to EPA’s reasonable interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also* United States MPSJ (ECF No. 117) at 6-7. In fact, Supreme Court precedent dictates that, unless

EPA's interpretation is "plainly erroneous or inconsistent with the regulation," it should be afforded "controlling weight." *Auer*, 519 U.S. at 453; *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-82 (2011); *Stinson v. United States*, 508 U.S. 36, 45 (1993). Where, as here, the subject is both technical and complex, "[t]he principle of deference has particular force." *WEPCo*, 893 F.2d at 907. Indeed, even if DTE's suggested test could be squared with the statute's mandate (it cannot) or the Company's arguments were consistent with binding precedent (they are not), this Court should nonetheless apply EPA's longstanding interpretation of the Agency's routine maintenance exception. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (agency's interpretation would be given "controlling weight" even if it was not "more consistent" with the regulations than petitioner's).

## **II. DTE'S APPROACH TO ASSESSING ROUTINE MAINTENANCE CLAIMS IS CONTRARY TO THE CLEAN AIR ACT, CASE LAW, AND COMMON SENSE**

It its Motion, DTE asks this Court to adopt a "routine in the industry" test for evaluating routine maintenance claims. The Company does not delineate just how its proposed test would operate in practice (nor even cite the 2000 DTE Determination in which EPA explained to *this company* just how routine maintenance claims should be assessed). Moreover, the courts DTE cites vary dramatically in the degree to which they considered industry practice when assessing routine maintenance claims. *Compare Penn. Dept. of Env'tl. Protection v. Allegheny Energy, Inc.*, No. 05-885, 2008 WL 4960100, at \* 22, \*24 (W.D. Penn. Sept. 2, 2008), with *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.* ("*NPCA IP*"), No. 3:01-CV-71, 2010 WL 1291335, at \*25-26 (E.D. Tenn. Mar. 31, 2010). As described and applied by its own expert, though, DTE's proposed test all but ignores the history and practices of Monroe Unit 2 or other individual units in the industry, preferring instead to focus on industry-wide tallies of allegedly similar projects. *See Declaration of Jerry Golden* (ECF. No. 46-10) at 59-61.

Rather than address EPA's longstanding approach to routine maintenance which contemplates the history and practices of *individual* units throughout the relevant industry, DTE erects a straw man from which it distinguishes its own untenable position. By urging the court to adopt its version of a "routine in the industry" test instead of its own characterization of a "routine at a particular unit" test, DTE erects a "false dichotomy" and asks that this Court shun one extreme in favor of another. See *United States v. Duke Energy Corp.* ("*Duke Energy IV*"), No. 1:00CV1262, 2010 WL 3023517, at \*7 (M.D.N.C. July 28, 2010). DTE's proposed test is contrary to the purposes and provisions of the Clean Air Act, contrary to the interpretations of many of the very courts to which DTE cites for support, and indeed contrary to common sense.

**1. Emphasizing Industry-Wide Tallies of Projects Creates a Shifting Standard Controlled by Industry Members**

DTE urges that the Court adopt a "routine in the industry" test instead of a "routine at the unit" test. In so doing, DTE seeks to underscore evidence of allegedly similar projects undertaken throughout the industry while downplaying or ignoring the unit-to-unit comparisons that a common sense, case-by-case review requires.

To illustrate DTE's approach to the routine maintenance exception, consider an aging fleet of cars in which each car was purchased the same year. As the fleet ages, the owner will be faced with a choice as major components like the transmission wear out: replace the cars with new ones that meet modern emissions requirements, or replace the failing components in the existing fleet. Unless replaced with new cars, as the existing fleet continues to age the number of transmission replacements performed within the fleet will likely increase and accelerate, with each replacement giving the old car a new lease on life. Of course, a transmission replacement is a far cry from the kind of maintenance routinely performed on vehicles such as changing the oil, replacing a headlight, or putting on new tires. Moreover, a cross-fleet tally of all the

transmission replacements performed within the fleet does not capture the fact that new transmissions will likely only ever be installed once or twice in the lifetime of any given car, and it glosses over potentially important vehicle-to-vehicle differences such as variations in their use or whether a car has an automatic or manual transmission. Under DTE's view, the rising tally of transmission replacements would indicate that such work was growing to be "routine" within the fleet. Under EPA's longstanding interpretation, a raw tally of how many transmission replacements have been performed may say something about the age of the fleet and the size of the fleet, but, without more, it says precious little about how "routine" such replacements are.

Like the fleet of cars, the fleet of grandfathered power plants is aging. These plants were originally exempted from modern pollution control requirements, but must meet such requirements once they are modified. *See Ala Power*, 636 F.2d at 400. Under DTE's approach to the routine maintenance exception, massive renovations aimed at rehabilitating those "power generating units whose capacity has significantly deteriorated over a period of years" would become more "routine" as the fleet ages and other similar renovations are implemented. *Cf.* Clay Memo (Ex. 1) at 4. By focusing on industry-wide practices, DTE is attempting to establish a standard whereby, as more massive modifications are undertaken by the electric industry, fewer trigger the health- and welfare-protecting requirements of the NSR program.<sup>5</sup> Such a result is far from common-sense. *Cf. WEPCo*, 893 F.2d at 910; Clay Memo (Ex. 1) at 3. As EPA explained

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<sup>5</sup> In order to avoid the absurd result that comes with DTE's industry-centric approach that massive renovations become more "routine"—and the Clean Air Act's protections more obsolete—over time, routine maintenance claims would have to be evaluated in light of what was "routine in the industry" as of a certain benchmark year (for example 1980, the year the NSR regulations were finalized). Of course, under EPA's longstanding interpretation, the Court need not determine which year should be used as the industry benchmark for analysis, nor how many similar projects across the entire industry must be identified before the count weighs in favor of a determination that a give project is routine. Rather, under EPA's approach, once- or twice-in-a-lifetime projects are infrequent no matter what year they were performed or how many other plants may have undergone such renovations in the past.

in the Clay Memo, “[i]n adopting the [NSR] . . . program[], Congress sought to focus air pollution control efforts at an efficient and logical point: the making of long-term decisions regarding the creation or renewal of major stationary sources.” Clay Memo (Ex. 1) at 12; *see also WEPCo*, 893 F.2d at 909. DTE’s proposed test would obscure the importance and rarity of such long-term decision points at any one plant, it would severely erode NSR applicability, and it would undermine Congress’ effort to drive the industry to install better pollution controls.

Recognizing the difficulties presented by such an approach, not even those cases cited by DTE support its position that industry-wide statistics should form the cornerstone of the routine maintenance determination. *See, e.g., Allegheny*, 2008 WL 4960100 at \*22, \*24 (finding the utility’s proffered industry-wide tallies lacking sufficient detail to be persuasive where the projects at issue had never before been performed in the history of the generating units). Indeed, many of the very courts on which DTE relies have explicitly held that “[t]he test does not turn on whether a particular replacement project has *ever* occurred in the industry or even necessarily the number of times it has occurred within the industry.” *United States v. E. Ky. Power Co-op., Inc.* (“EKPC”), 498 F. Supp. 2d 976, 993 (E.D. Ky. 2007) (emphasis original); *see also United States v. Ala. Power Co.*, 681 F. Supp. 2d 1292, 1312 (N.D. Ala. 2008) (adopting the quoted language from EKPC); *Nat’l Parks Conservation Ass’n v. Tenn. Valley Auth.*, 618 F. Supp. 2d. 815, 825 (E.D. Tenn. 2009) (same). The Court in *Duke Energy IV* further elaborated:

Although the WEPCO factors will be evaluated with reference to the industry, the WEPCO test, which this Court has held is entitled to deference, dictates that the Court make a fact intensive, “common sense” evaluation. *See WEPCO*, 893 F.2d at 910-11.

This means that the Court will not forego any consideration of what occurs at individual units and look solely at industry practice to determine whether a project is RMRR. Instead, “the Court will consider all of the WEPCO factors, including frequency, taking into consideration the work conducted at the particular [Duke Energy] unit, the work conducted by others in the industry, and the work

conducted at other individual units within the industry.” [EKPC, 498 F. Supp. 2d at 993-94.] *To do otherwise would be to defy common sense, ignore the “case-by-case” determination required by the WEPCO test, and allow the industry to render the PSD program a nullity by making its own practice the sole standard.*

2010 WL 3023517 at \*7 (emphasis added). In fact, of all the courts to address this issue, only one arguably relied on industry-wide statistics to the degree urged by DTE in this case. *See NPCA II*, 2010 WL 1291335.<sup>6</sup> Thus, far from the majority holding or modern trend, DTE’s proposed version of the “routine in the industry” test is neither practicable nor in line with precedent.

## **2. DTE’s Approach Seeks to Expand the Routine Maintenance Exception Contrary to the Language and Purposes of the Clean Air Act**

In addition to being contrary to both common sense and case law, DTE’s approach to the routine maintenance exception runs contrary to the language and purposes of the Clean Air Act itself. As discussed in Plaintiff’s Motion for Partial Summary Judgment,<sup>7</sup> the Act imposes its requirements on “*any* physical change” that would result in an emissions increase. 42 U.S.C. § 7411(a)(4) (emphasis added). The sweeping scope of this definition is consistent with Congress’ express purpose of protecting human health and welfare. *See* 42 U.S.C. § 7470; *WEPCo*, 893 F.2d at 905 (“Even at first blush, the potential reach of these modification provisions is apparent: the most trivial activities—the replacement of leaky pipes, for example—may trigger the modification provisions if the change results in an increase in the emissions . .

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<sup>6</sup> The *NPCA* Court turned the routine maintenance analysis on its head by comparing the challenged projects to all other capital investment projects and essentially asking whether the projects were not “extraordinary” rather than whether they were routine maintenance. *NPCA II*, 2010 WL 1291335 at \*25. This approach not only eviscerates the necessarily narrow character of the routine maintenance exclusion, it turns the exclusion into an empty tautology under which similar replacement activities at similar sources will by definition have similar characteristics and so always be judged “routine.” The internal inconsistencies of the *NPCA* decisions, along with the subsequent *Duke Energy IV* ruling, leave it unpersuasive and of little precedential value.

<sup>7</sup> *See* (ECF No. 117) at 8–9.

.”); *United States v. S. Ind. Gas & Elec. Co.* (“*SIGECO*”), 245 F. Supp. 2d 994, 1009-10 (S.D. Ind. 2003) (the broad definition of “modification” is illustrative of Congressional intent for broad NSR applicability); Clay Memo (Ex. 1) at 3 (“The clear intent of the [NSR] regulations is to construe the term ‘physical change’ very broadly, to cover virtually any significant alteration to an existing plant.”).

Critically, the D.C. Circuit has twice ruled that the statute’s broad mandate will admit exceptions only for *de minimis* activities. See *New York II*, 443 F.3d at 890; *Ala Power*, 636 F.2d at 400. EPA’s discretion to exempt some modifications in its regulations is “tightly bounded by the need to show that the situation is genuinely *de minimis* or one of administrative necessity.” *Ala. Power*, 636 F.2d at 361; see also *New York II*, 443 F.3d at 888. To remain consistent with the plain language of the NSR provisions, EPA must thus interpret the “routine maintenance” exception narrowly “as limited to ‘*de minimis* circumstances.’” *New York II*, 443 F.3d at 884; see also *Ala. Power*, 636 F.2d at 400; *New York v. Am. Elec. Power Serv. Corp.*, Nos. 2:04CV1098, 2:05CV360, 2007 WL 539536, at \*2 (S.D. Ohio Feb. 15, 2007).

Emphasizing industry-wide tallies over the operating histories and procedures of individual units would untether the routine maintenance exception from its limitation to *de minimis* activities. Intuitively, evidence that certain kinds of projects are performed frequently at individual units throughout the industry tends to indicate that the work is not undertaken as the result of long-term decisions regarding the rehabilitation of a generating unit, and so suggests the work is *de minimis* in its scope. Cf. Clay Memo (Ex. 1) at 12. By contrast, even where tallies indicate that a number of other plants have undertaken similar work, such work may nevertheless involve massive capital investment projects that are developed over a period of years and aim to benefit a plant for decades. In arguing that this Court consider what is “routine in the industry,”



DTE in fact asks this Court to ignore the context of the industry's day-to-day operations so that huge and relatively rare undertakings may appear more "routine." Were the Court to adopt such an expansive view of the routine maintenance exception "the application of . . . [NSR] to important facilities might be postponed into the indefinite future." *WEPCo*, 893 F.2d at 909.

### 3. DTE's Approach Frustrates the Purposes and Structure of the NSR Program

Contrary to DTE's unsupported effort to paint the NSR program as regulating existing sources "only as necessary to meet national air quality standards," DTE MPSJ (Doc. 116) at 3, the Supreme Court has explained that NSR requires sources to install and operate state-of-the-art pollution controls "*notwithstanding* attainment and maintenance of the [air quality standards]." *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007) (quoting 42 U.S.C. § 7470(1)) (emphasis added). Indeed, the NSR program was added to the Clean Air Act when it became clear that earlier programs "did too little to achieve the ambitious goals" of the statute. *Id.* (internal quotations omitted). Thus, fundamentally, the NSR program was designed to be "technology forcing," that is, "to stimulate the advancement of pollution control technology;" it was not adopted in order to maintain the status quo and cannot be read to categorically exempt the replacement of deteriorated components. *WEPCo*, 893 F.2d at 909.

EPA's interpretation—as explained in the Clay Memo and DTE Determination and as implemented in at least a dozen other applicability determinations<sup>8</sup>—confines the exception to *de minimis* activities and so remains consistent with the Act's technology directive. *See* United States' MPSJ (ECF No. 117) at 10–12. On the other hand, DTE's broad interpretation of routine maintenance—one which exempts even extensive, multi-million dollar capital improvement projects so long as similar work was performed at other plants—would tend to stagnate the

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<sup>8</sup> *See* United States MPSJ Ex. 3 (ECF No. 117-4) (collecting EPA determinations implementing the routine maintenance exception).

development of pollution control technology rather than drive the diffusion of new technology. By increasing the scope of the exception beyond *de minimis* activities, state-of-the-art pollution controls would be required of fewer modifications, and so the market for—and the incentive to develop—new pollution control technologies would be substantially reduced. Moreover, DTE’s interpretation “distort[s] the choice between rebuilding an old plant and replacing it with a new one” by “giv[ing] the [C]ompany an artificial incentive to renovate a plant and by so doing increase the plant’s hours of operation, rather than to replace the plant.” *United States v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006) (addressing a utility’s similarly flawed interpretation of other NSR provisions). As the Seventh Circuit noted when it rejected WEPCo’s construction of the NSR modification provisions twenty years ago, “[t]he development of emissions control systems is not furthered if operators could, without exposure to the standards of the 1977 Amendments, increase production (and pollution) through the extensive replacement of deteriorated generating systems.” *WEPCo*, 893 F.2d at 910.

### **III. EPA NEITHER ADOPTED DTE’S “ROUTINE IN THE INDUSTRY” TEST NOR CHANGED ITS INTERPRETATION OF ROUTINE MAINTENANCE**

In its Motion, DTE argues that EPA once adopted a “routine in the industry” test, that the Agency is attempting to narrow its pre-existing interpretation of the routine maintenance exception through enforcement actions, and further that such a shift in regulatory interpretation would require notice-and-comment proceedings.

Although DTE is mistaken at each step of this argument, as detailed below, it is important at the outset to maintain focus on the central debate. EPA long ago made it clear that the regulatory exception for routine maintenance, repair or replacement was to be understood as a “very narrow exclusion.” Clay Memo (Ex. 1) at 3; *see also* Letter from David Howekamp, EPA Region IX, at 3-6 (Nov. 6, 1987) (Ex. 3-F to United States’ MPSJ, ECF No. 117-10) at 3

(describing the routine maintenance as one of a “narrow and limited set of exclusions”). The statute’s language mandates that the routine maintenance exception be a narrow one, and the D.C. Circuit has held that such exceptions must be confined to benefit only *de minimis* activities. *New York II*, 443 F.3d at 888; *Ala. Power*, 636 F.2d at 400. Any test that would immunize once-in-a-lifetime, multi-million dollar capital improvement projects that aim to rehabilitate deteriorated generating units cannot be said be “narrow” nor properly confined to *de minimis* activities. Rather, such an approach would be contrary to the D.C. Circuit’s rulings and—by DTE’s own argument—constitute an impermissible change from the EPA’s approach outlined in the authoritative Clay Memo. In addition to this fundamental flaw, the details of DTE’s argument—and the assumptions upon which it rests—do not withstand scrutiny.

**1. The WEPCo Determination and Seventh Circuit Opinion Emphasize the History and Procedures of Individual Units Over Industry-Wide Tallies**

A close reading of EPA’s WEPCo determination and the Seventh Circuit’s *WEPCo* opinion illustrates that the practices of individual units—and not the entire industry—has long been the focus of the routine maintenance analysis.

As an initial matter, DTE’s argument relies on a logical misstep. The Clay Memo noted that WEPCo’s proposed projects were “highly unusual, if not unprecedented.” (Ex. 1) at 4. From this, DTE implies that, because EPA mentioned a project’s *scarcity* across the industry when *rejecting* a company’s assertion that it was routine, EPA must also consider a project’s apparent *prevalence* across the industry to *support* a determination the project is routine. *See* DTE’s Motion (ECF No. 116) at 9. This is akin to arguing that, because a pig does not have wings and thus cannot fly, it must mean that, since a penguin does have wings, it can fly. DTE fails to understand that, where a project is scarcely performed across the industry, it is *necessarily* an infrequent undertaking at a typical generating unit and so *cannot* help the utility

bear its burden of proof under the routine maintenance test.<sup>9</sup> Far from DTE's strained position that EPA adopted its "routine in the industry" test, the Clay Memo's reference to industry practice is merely the application of run-of-the-mill, summary-judgment style reasoning where the utility's evidentiary proffer could not establish—even under the most favorable light—that its projects were "frequent." *See, e.g.*, Clay Memo (Ex. 1) at 7 n.6.

Moreover, the two mentions of industry practice in the WEPCo determinations do not support DTE's position. First, the EPA Administrator addressed WEPCo's "equity" argument—not its routine maintenance claim—that the company was being treated inconsistently with historic EPA determinations. *See* Letter from Lee Thomas to John Boston (October 14, 1988) (Ex. 3-K to United States' MPSJ, ECF No. 117-15) at 3. In fact, WEPCo's reliance on the practices of other electric utilities not only failed to immunize its own projects, but rather served to illustrate the breadth of the industry's non-compliance. *See id.* at 4. Second, the Agency considered WEPCo's proffered evidence of 40 other air heater projects. *See* Clay Letter (Ex. 3-L to United States' MPSJ, ECF No. 117-16) at 7 n.6. However, far from squarely considering and weighing the evidence in its routine maintenance determination, EPA concluded the evidence was inapposite because it concerned projects that were not sufficiently similar to the projects then at issue. *See id.* Moreover, where EPA did—in a footnote—consider the evidence, the Agency took care to examine project frequency at individual units: "even at the 40 units, air heater repair or replacement appears to have been a one-time occurrence, not routine repair." *Id.* at 7 n.6. Thus, EPA's central concern in evaluating routine maintenance claims has ever been the history and procedures of individual plants. *See SIGECO*, 245 F. Supp. 2d at 1019-20 (Clay

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<sup>9</sup> DTE's suggestion that the United States bears the burden of proving the Company's projects were *not* routine, ECF No. 116 at 2, is contrary to Supreme Court precedent and the holding of *every* court to have addressed the issue. *See* United States' MPSJ (ECF No. 117) at 4-6.

Memo “put the regulated community on notice that how frequently projects occur in a unit’s expected life cycle was a very significant factor in the routine maintenance inquiry.”).

The Seventh Circuit’s review of EPA’s determinations says no different. There, the Court referred to industry-wide practices in two different contexts, and again neither support DTE’s proposed emphasis of such evidence. *See id.* at 1017-18 (indicating that the *WEPCo* decision upheld EPA’s interpretation, which considered a project’s frequency at individual units a “significant factor”). First, the Seventh Circuit reviewed EPA’s determination that the air heater tally presented by WEPCo was entirely inapposite because it counted up projects that were dissimilar to those at issue in the case. *WEPCo*, 893 F.2d at 911. The Court never considered whether—or to what extent—a list of other allegedly similar projects might weigh on a routine maintenance determination. Second, the Seventh Circuit observed that the “unprecedented” character of WEPCo’s projects might have been indicative of a shift in strategy as to how to supply electricity in the future—where aging plants once would have been retired from service and replaced by more efficient units, operators were instead performing extensive life-extension projects to rehabilitate the deteriorating units. *See id.* Far from supporting DTE’s argument that the Seventh Circuit considered general industry practice to be an important factor, the *WEPCo* Court’s discussion illustrates an awareness that industry practice was changing, and that the NSR program’s requirements must be brought to bear on such rehabilitation projects.

## **2. EPA Never Adopted DTE’s “Routine in the Industry” Test**

In the wake of the Seventh Circuit’s *WEPCo* opinion, EPA altered the method it used to evaluate increases in emissions resulting from physical changes at a generating unit. In the preamble to that 1992 WEPCo Rule, EPA noted:

A few commenters requested that EPA define or provide guidance on “routine repair, replacement and maintenance” activities. The June 14 proposal did not

deal with this aspect of the regulations, nor do the regulatory changes promulgated today. However, the issue has an important bearing on today's rule because a project that is determined to be routine is excluded by EPA regulations from the definition of major modification. . . . EPA is today clarifying that the determination of whether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.

57 Fed. Reg. 32,314, 32,326 (July 21, 1992). This is the full extent of EPA's comments on the interpretation of the routine maintenance exception in the 1992 rule.

DTE repeatedly underscores the final phrase in the paragraph in an effort to establish that EPA here adopted its "routine in the industry" test. However, nowhere does EPA discuss the details of the exception's application, nor in any way imply that it meant to overturn the approach set forth in the Clay Memo. As the Court in *SIGECO* cogently expressed:

The only insight that this routine maintenance clarification provides about the frequency factor is contained in the last five words of the paragraph: "within the relevant industrial category." . . . As *SIGECO* argues, it refers to a comparison within the relevant industry, and does not specifically mention the significance of whether or not a project has been undertaken at a particular unit. However, because it is so brief, and because it was contained in a preamble to regulatory changes that had nothing to do with routine maintenance, the preamble language does not clarify much about the frequency factor, and certainly does not indicate to the regulated community that the EPA meant any change from the interpretation it advanced in the Clay Memo.

*SIGECO*, 245 F. Supp. 2d at 1021; *see also* EAB Final Order (Ex. 6 to United States' MPSJ, ECF No. 117-19) at 391-96. Indeed, this clarification is perfectly appropriate in order to maintain the fact-sensitive routine maintenance inquiry where technical terminology—like EPA's regulations—cuts across industry boundaries. *Compare* Letter to D. E. Choate (Mobil Oil Corp) from Chief, Air Compliance Branch EPA Region II (Sept. 7, 1988) (Ex. 3) (proposed cyclone replacement project considered routine maintenance at catalytic cracking unit) *with* EAB Final Order, ECF No. 117-19 at 484-86 (cyclone replacement projects at electric generating unit

did not qualify for the routine maintenance exception). Thus the 1992 Preamble cannot be said to establish the “routine in the industry” test urged by DTE in this case. Rather, it confirms that the routine maintenance exception is determined on a case-by-case basis, and explicitly recognizes that the question whether a project is routine at a particular type of unit depends on what “industrial category” is at issue. *See* DTE Determination (Ex. 2) Encl. at 15; EAB Final Order (ECF No. 117-19) at 395-96.

Likewise, DTE’s reliance on mentions of the *WEPCo* case in the GAO report (ECF No. 116-7) and in a letter to Congressman Dingell (ECF No. 116-10) is misplaced. The comments in these documents do not even mention the routine maintenance exception, nor are they inconsistent with EPA’s approach—as presented in the Clay Memo—that the histories and practices of individual units in the industry would be considered when evaluating routine maintenance claims. These statements do not construe the routine maintenance exception nor do they profess to alter the Agency’s official opinion on the matter. *See SIGECO*, 245 F. Supp. 2d at 1019–20. None of the documents DTE cites possess the formal status, clarity, or persuasiveness necessary to accomplish an “about face” in EPA’s regulatory interpretation set forth in the Clay Memo. In the end, it is telling that, to support its assertion that EPA implemented the Company’s version of the “routine in the industry test,” DTE relies exclusively on documents that contain *zero* legal analysis. This is not the stuff of regulatory interpretation nor the legal analysis upon which a coherent permitting regime can be based; it is obfuscation.

### **3. DTE’s Argument That EPA Changed Its Interpretation of the Routine Maintenance Exception in 1999 is Without Merit**

DTE argues that EPA impermissibly changed its interpretation of the routine maintenance exception in 1999, shifting its focus from industry-wide practices to “solely” considering the history of the particular unit at issue. According to DTE, such a change in

EPA's interpretation policy would require the Agency to go through the notice and comment rulemaking procedures.

In addition to mischaracterizing EPA's test, DTE's argument is not a new one. In fact, the utility industry made the same argument just after EPA issued the Clay Memo, ten years prior to EPA's NSR enforcement initiative. In 1989, the Utility Air Regulatory Group, a conglomerate of electric utilities represented by DTE's trial counsel Hunton & Williams and a group of which DTE is a member, sent a letter to the Department of Energy describing what it perceived to be problems with EPA's routine maintenance analysis as set forth in the Clay Memo. *See* Letter from Henry V. Nickel (June 5, 1989) [UARG1 0000090–100] (Ex. 4) (“UARG Letter”); *see also SIGECO*, 245 F. Supp. 2d at 1003, 1019 (discussing the UARG Letter as evidence of industry knowledge of EPA's narrow interpretation).<sup>10</sup> After briefly outlining EPA's then-recent applicability determinations, the letter notes:

EPA's decisions acknowledge that “routine” repairs and replacements are not subject to the NSPS and PSD modification rules. However, the Agency has arbitrarily redefined what repair and replacement activities are “routine,” such that “routine” activities include only those that (1) are *frequently done at that plant*, (2) involve no major equipment, (3) are inexpensive, and (4) do not extend the life of a plant. This new interpretation is vastly different from past implementation of the “routine” rule, which included any repair and replacement activity that is *normal business practice*.

UARG Letter (Ex. 4), Encl. at 3 (emphasis added). The UARG Letter juxtaposes industry's interpretation of EPA's approach in the Clay Memo—which it describes as concerned with activities “frequently done at that plant”—with what the electric industry allegedly felt had been

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<sup>10</sup> DTE may attempt to argue that the UARG letter is inadmissible hearsay and should not be considered by this Court. However, the document is not presented for the truth of the matter asserted (indeed, the United States disagrees with some aspects of the interpretation presented in the letter), but rather for its reflection of the industry's understanding of the routine maintenance test in 1989. *See SIGECO* Evidentiary App'x (Ex. 5) at 11-12 (referenced in 245 F. Supp. 2d at 1000 n.4). Moreover, even were the Court to conclude the document was hearsay, it would qualify for the ancient documents exception of Fed. R. Evid. 803(16).



a historical focus on “normal business practice.” This supposedly “new interpretation” of the routine maintenance exception described in 1989 UARG Letter by advocates for electric utilities is precisely the same interpretation that DTE argues was sprung on the electric industry without warning a decade later in 1999. DTE is simply rehashing and repackaging the same arguments that EPA rejected over twenty years ago in the WEPCo matter, but the UARG Letter illustrates members of the electric industry understood long ago that EPA *did not* consider industry-wide practices to be an important consideration for evaluating routine maintenance claims. *See id.*; *see also SIGECO*, 245 F. Supp. 2d at 1019. Thus, the UARG letter undermines DTE’s assertion that EPA narrowed its interpretation of the routine maintenance exception in 1999 “by litigation fiat.” DTE’s Motion (ECF No. 116) at 17.

In sum, DTE’s “impermissible change” argument is untenable for a panoply of reasons. First, DTE cannot establish a “change” in EPA’s interpretation. Plaintiffs’ interpretation of the routine maintenance exception as presented in the United States MPSJ (ECF No 117) is entirely consistent with the approach set forth in EPA’s authoritative Clay Memo. Relatedly, DTE is essentially arguing in its Motion that the United States undervalues industry-wide business practices just as the electric industry complained that EPA was undervaluing the same information in 1989 at the time of the WEPCo determination—ten years before EPA’s enforcement initiative and twenty years before projects at issue in this case. UARG Letter (Ex. 4), Encl. at 3. Plaintiffs’ interpretation of the routine maintenance exception cannot be considered a new and inconsistent interpretation when the electric generating industry itself recognized EPA did not consider “normal business practices” to be dispositive in routineness determinations. Moreover, as EPA explained *to DTE* in 2000, the Preamble to the 1992 WEPCo Rule is consistent with the Agency’s longstanding interpretation that the practices of individual

units throughout the industry supply contextual background for the consideration of specific routine maintenance claims. *See* DTE Determination (Ex. 2) at Encl. 15; *see also* 57 Fed. Reg. at 32,326; *SIGECO* 245 F. Supp. 2d at 1021; EAB Final Order (ECF No. 117-19) at 395-96.

Finally, even if the 1992 WEPCo Preamble was inconsistent with the Clay Memo's approach (it is not) and even if it did set out to adopt DTE's version of the "routine in the industry" test (it did not), that attempt—by DTE's own argument—would constitute an impermissible change in the Agency's policy and an illegal expansion of the exception's scope, whether measured against the language of the Clay Memo itself or the electric industry's express interpretation of the Memo at the time. *See* 57 Fed. Reg. at 32,326 (noting that the notice of proposed rulemaking "did not deal with [the routine maintenance] aspect of the regulations"); *accord Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985) (holding that an agency's notice of proposed rulemaking "must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking" (internal citations omitted)). Any one of these bases is sufficient to undermine DTE's "impermissible change" argument.

### CONCLUSION

For the foregoing reasons, the United States respectfully requests this Court deny DTE's Motion regarding the applicable legal standard for assessing routine maintenance claims.

Respectfully Submitted,

IGNACIA S. MORENO  
Assistant Attorney General  
Environment & Natural Resources Division

Dated: August 1, 2011

s/ Elias L. Quinn  
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 1, 2011, the foregoing brief was served via ECF on counsel of record.

s/ Elias L. Quinn  
Counsel for the United States

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
	)	
and	)	
	)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE	)	
COUNCIL, and SIERRA CLUB	)	Magistrate Judge R. Steven Whalen
	)	
Plaintiff-Intervenors	)	
	)	
v.	)	
	)	
DTE ENERGY COMPANY, and	)	
DETROIT EDISON COMPANY	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF  
"ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"**

**Appendix A**

**Index of Exhibits**

<b>Exhibit No.</b>	<b>Description</b>
1	Memo from Don Clay to David Kee re: Applicability of Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) Requirements to Wisconsin Electric Power Company Port Washington Life Extension Project (Sept. 9, 1988)
2	Letter from Francis Lyons to Henry Nickel re: applicability determination for Detroit Edison's "Dense Pack" project at Monroe Power Plant (May 23, 2000)

Exhibit No.	Description
3	Letter from Kenneth Eng (EPA Region 2) to Dale Choate (Mobil Oil Corp.) re: replacement of regenerator cyclones at Paulsboro refinery constitutes routine maintenance (Sept. 7, 1988)
4	Letter from Henry Nickel (Counsel for UARG) to Polly Gault (U.S. Dept. of Energy) enclosing briefing paper "The WEPCO, Detroit Edison, and Ohio Edison Decisions" (June 5, 1989)
5	Order (with Appendix) on Southern Indiana Gas & Electric Company's Motion for Summary Judgment on Fair Notice, <i>United States v. S. Ind. Gas &amp; Elec. Co.</i> , No. IP99-1692-C-M/F (S.D. Ind. Feb. 13, 2003) (Appendix not published)

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
	)	
and	)	
	)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE	)	
COUNCIL, and SIERRA CLUB	)	Magistrate Judge R. Steven Whalen
	)	
Plaintiff-Intervenors	)	
	)	
v.	)	
	)	
DTE ENERGY COMPANY, and	)	
DETROIT EDISON COMPANY	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF  
"ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"**

**EXHIBIT 1**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

SEP 9 1988

OFFICE OF  
AIR AND RADIATION

MEMORANDUM

SUBJECT: Applicability of Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) Requirements to the Wisconsin Electric Power Company (WEPCO) Port Washington Life Extension Project

FROM: Don R. Clay, Acting Assistant Administrator  
for Air and Radiation (ANR-443)

TO: David A. Kee, Director  
Air and Radiation Division, Region V

This is in further response to your March 25, 1988 memorandum requesting guidance on PSD applicability regarding the proposed renovation of the Port Washington Power Plant by the WEPCO. I have also addressed the question whether the renovations proposed for this facility would subject the individual units to Subpart Da of the NSPS.

Based on the information presented in your memorandum, subsequent written information received from WEPCO, information provided by the State of Wisconsin, and other information contained in the Environmental Protection Agency's (EPA's) files on this matter, I have concluded that, as proposed, this renovation project would not come within the PSD and NSPS exclusions for routine maintenance, repair, and replacement, nor the exclusions for increases in production rate or hours of operation. It also appears that the project would increase emissions within the meaning of these two programs. Thus, the renovation project likely would be subject to PSD review as a major modification of an existing stationary source and that the renovations proposed for units 1-5 at this facility probably would subject the individual units to Subpart Da of the NSPS as a modification. However, WEPCO has not yet requested EPA to make an applicability determination. In any case, it would not be possible to make final applicability determinations at this point, for three basic reasons.

First, EPA must be supplied sufficient data regarding the various pollutants emitted by the Port Washington facilities to determine, on a pollutant-specific basis, how the proposed renovations would affect emissions levels. Second, WEPCO might avoid both PSD and NSPS applicability by adding or enhancing pollution control equipment, or in the case of PSD, restricting



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operations below maximum potential such that the emissions increases necessary to trigger applicability would not occur. The WEPCO should discuss its plans in this regard with EPA. Third, regarding NSPS applicability to unit 1, additional information is necessary to determine whether a physical or operational change would occur.

Thus, although this memorandum will serve to answer many of the questions necessary to reaching final determinations, you should advise WEPCO that ultimately applicability depends upon changes in emissions after the renovations and whether the company decides to take the steps which would enable it to lawfully avoid coverage. Also, NSPS coverage of unit 1 can only be determined after an evaluation of the additional information regarding the work to be performed. In addition, as to NSPS, WEPCO should be advised to submit a formal request pursuant to 40 CFR 60.5 if it desires a final applicability determination.

As the need for further factual development here suggests, determinations of PSD and NSPS applicability are fact-specific, and must be made on a case-by-case basis. This memorandum provides a framework for analyzing the proposed changes at Port Washington and gives EPA's views on relevant issues of legal interpretation. It should also be useful in assessing other so-called "life extension" projects in the future. However, any such project would need to be reviewed in light of all the facts and circumstances particular to it. Thus, a final decision regarding PSD and NSPS applicability here would not necessarily be determinative of coverage as to other life extension projects.

If you have any further questions regarding the discussion or conclusions in this memorandum, please have your staff contact David Solomon of the New Source Review Section at FTS 629-5375.

#### I. Background

As mentioned in your March 25 request, the five coal-fired units at Port Washington began operation in 1935, 1943, 1948, 1949, and 1950, respectively. Each unit was initially rated at 80 megawatts electrical output capacity. In recent years, however, the performance of the units began to deteriorate due to age-related degradation of the physical plant. In particular, inspections performed by a WEPCO consultant in 1984 revealed extensive cracks originating from the internal surfaces of the rear steam drums and boiler bank boreholes in units 2, 3, 4, and 5, creating significant safety concerns. Because of these safety concerns and other age-related problems, in 1985 the operating levels of units 2, 3, and 4 were reduced, and unit 5 was removed from service. As a result of the plant's deteriorating condition, the maximum rated physical capacities of units 1, 2, 3, and 4 at this time are 45, 65, 75, and 55 megawatts, respectively.

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The life extension project includes extensive capital improvements to the common facilities and each of the individual units, including replacement of the rear steam drum in units 2, 3, 4, and 5. The renovation work will restore the physical and operational capability of each unit to its original 80 megawatt nameplate capacity, and extend the useful life of the units well beyond the planned retirement dates that would otherwise apply. Upon completion of the project, WEPCO intends to substantially increase the actual operations at the Port Washington plant.

## II. PSD Applicability

The life extension project at Port Washington is subject to preconstruction review and permitting under the Act's PSD provisions if it is a "major modification" within the meaning of the Act and EPA's regulations. The PSD regulations at 40 CFR 52.21 govern this determination because Wisconsin has been delegated PSD permitting authority under the provisions of 52.21(u). The definition of "major modification" in 52.21(b)(2)(i) requires an analysis of several factors. These factors may be grouped under two general questions. Will the work entail a "physical change in or change in the method of operation of a major stationary source"? If so, will the change "result in a significant net emissions increase of any pollutant subject to regulation under the Act" [see 52.21(b)(2)(i)]? The Port Washington facility is an existing major stationary source because it emits well in excess of the PSD threshold amount for several pollutants.

### A. Physical Change or Change in the Method of Operation

This requirement of a major modification is satisfied if either a physical or operational change would occur.

#### 1. Physical Change

The renovation work called for under the proposed life extension project at Port Washington would constitute a "physical change" at a major stationary source. The clear intent of the PSD regulations is to construe the term "physical change" very broadly, to cover virtually any significant alteration to an existing plant. This wide reach is demonstrated by the very narrow exclusion provided in the regulations: other than certain uses of alternate fuels not relevant here, only "routine maintenance, repair and replacement" is excluded from the definition of physical change [see 52.21(b)(2)(i)(i)(a)].

In determining whether proposed work at an existing facility is "routine," EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding. In this case, all of these factors suggest that the work required under WEPCO's life extension project appears not to be "routine." The available information indicates that the work proposed at Port Washington is far from being a regular, customary, or standard undertaking for the purpose

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of maintaining the plant in its present condition. Rather, this is a highly unusual, if not unprecedented, and costly project. Its purpose is to completely rehabilitate aging power generating units whose capacity has significantly deteriorated over a period of years, thereby restoring their original capacity and substantially extending the period of their utilization as an alternative to retiring them as they approach the end of their useful physical and economic life. The most important factors that would support these conclusions are outlined below.

a. The project would involve the replacement of numerous major components. The information submitted by WEPCO shows that the company intends to replace several components that are essential to the operation of the Port Washington plant. In particular, as noted above, WEPCO would replace the rear steam drums on the boilers at units 2, 3, 4, and 5. According to WEPCO, these steam drums are a type of "header" for the collection and distribution of steam and/or water within the boilers. They measure 60 feet long, 50.5 inches in diameter, and 5.25 inches thick, and their replacement is necessary to continue operation of the units in a safe condition. In addition, at each of the emissions units, WEPCO plans to repair or replace several other integral components, including replacement of the air heaters at units 1, 2, 3, and 4. The WEPCO also plans to renovate major mechanical and electrical auxiliary systems and common plant support facilities. The WEPCO intends to perform the work over a 4-year period, utilizing successive 9-month outages at each unit.

In its July 8, 1987 application for authority to renovate to the Public Service Commission of Wisconsin (PSC), WEPCO described the life extension project and explained its purpose and necessity. The WEPCO took care to distinguish the proposed renovation work from routine maintenance that did not require PSC approval, explaining that:

... [work items] falling into the category of repetitive maintenance that are normally performed during scheduled equipment outages do not require specific commission approval and, accordingly, are not included in this application.

Thus, WEPCO's own earlier characterization of this project supports a finding that the planned renovations are not routine.

b. The purpose of the project is to significantly enhance the present efficiency and capacity of the plant and substantially extend its useful economic life. In its application to the PSC, WEPCO pointed out that due to age-related deterioration, total plant capability had declined by 40 percent. The company noted that the currently planned retirement dates for the Port Washington units, as set forth in its Advance Plan filed with the State, ranged from 1992 to 1999. However, WEPCO asserted that "extensive renovation of the five units and the plant common facilities is needed if operation of the plant is to be continued." In any event, WEPCO stated that the renovation work would allow the Port Washington plant to generate power at its designed capacity until the year 2010, and thus "represents a life extension of the units."

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In contrast, in its July 29, 1988 letter to EPA headquarters (pages 9-13), WEPCO characterized the renovation work as the timely, routine correction of equipment problems--principally, the steam drum cracks. However, the information presented leads to the conclusion that this is not the case. While replacement of the steam drums is necessary to restore lost generating capacity, that is not the only work proposed to be done. Based upon maximum capacity figures for past years, it appears that the units had experienced deterioration in physical generating capacity even prior to the discovery of the steam drum cracks in 1984. Thus, WEPCO proposes a wide-ranging project encompassing a broad array of tasks that would not only correct the steam drum problem, but correct other age-related deterioration that is essentially independent of the steam drums. Such other work (e.g., replacement of air handlers) apparently is also necessary as a practical matter to restore original nameplate capacity. Thus, it appears that even if WEPCO had undertaken this renovation work immediately following discovery of the steam drum cracks, it would have been proper to characterize the proposed work as a nonroutine life extension project.<sup>1</sup>

c. The work called for under the project is rarely, if ever, performed. The WEPCO's application to the PSC asserted that the work to be performed under the life extension project was not frequently done:

Generally, the renovation work items included in this application are those that would normally occur only once or twice during a unit's expected life cycle.

The EPA asked WEPCO to submit information regarding the frequency of replacement of steam drums, the largest category of work item called for under the project. WEPCO reported that to date, no steam drums have ever been replaced at any of its coal-fired electrical generating facilities. WEPCO did point out that it had replaced other "headers" comparable in design pressure and function. However, the largest of these was 16 inches in

<sup>1</sup>It is important to note in this regard that not all renovation, repair, or "life extension" projects would properly be characterized as modifications potentially subject to PSD and NSPS. For example, nonroutine repairs to correct unexpected equipment outages, even of major components such as steam drums, would not be subject to NSPS if they did not increase the maximum capacity of the affected facility as it existed prior to the outage. Conversely, undertaking a program of repair and maintenance properly characterized as routine would not subject a facility to the Act's requirements.

CIN30B6RM0077

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diameter, and EPA does not believe that they are comparable in diameter, wall thickness, function, or importance to the rear steam drums at Port Washington.<sup>2</sup>

d. The work called for under the project is costly, both in relative and absolute terms. The latest information supplied by WEPCO is that the renovation work at Port Washington will cost \$87.5 million, of which at least \$45.6 million is designated as capital costs.<sup>3</sup> The WEPCO reports that, in terms of annualized costs, the renovation project will cost \$7.8 million, as compared to \$51.6 million for a new 400 megawatt plant. Thus, renovation costs represent approximately 15 percent of replacements costs.

## 2. Change in the Method of Operation

The renovation work at Port Washington would not constitute a "change in the method of operation" within the meaning of the PSD regulations. However, it is clear that the "physical change" and "operational change" components of the "major modification" definition are discrete and independent. Thus, as explained below, PSD still applies if there is a physical change that will significantly increase net emissions.

In addition, the regulations exclude from the definition of physical or operational change "an increase in the hours of operation or in the production rate" [see 40 CFR 52.21(b)(2)(iii)(f)]. The preamble to the rule [45 FR 52676, 52704 (August 7, 1980)], makes it clear that this exclusion is intended to allow a company to lawfully increase emissions through a simple change in hours or rate of operation up to its potential to emit (unless already subject

<sup>2</sup>The WEPCO's July 29, 1988 letter to EPA stated (on page 13) that after further investigation, the company "learned of several examples" of steam drum failure and replacement. However, WEPCO provides no further details, other than noting that in one instance, the drum failed during initial testing and was replaced. Replacement of a failed component at a new facility presumably would not increase emissions from the facility, and probably would be viewed as routine if the alternative was to forego operation of that new facility. Under such circumstances, it is unlikely that the replacement would trigger the Act's requirements.

<sup>3</sup>The WEPCO's July 8, 1987 application to the PSC included a project cost estimate of \$83.9 million, of which \$45.6 million was designated as capital costs. A more recent cost estimate provided to EPA by WEPCO indicates that several work items are now deemed unnecessary, such that the cost of the original project is now estimated at \$70.5 million. However, all but \$89,000 of these reductions are designated as "maintenance" items. The recent submission also relates that the scope of the original project has now been expanded to include flue gas conditioning equipment and associated air heater work costing approximately \$17 million. Although WEPCO has not broken down these additional costs into capital and maintenance (or "expense") expenditures, it would appear that most, if not all, of this additional work would be classified as capital costs. Thus, it is highly likely that actual capital costs would be significantly higher than \$45.6 million.

CIN30B6RM0078

to any federally enforceable limit) without having to obtain a PSD permit. Thus, emissions increases at Port Washington associated with increased operations would not, standing alone, subject WEPCO to PSD requirements. However, as discussed in greater detail below, the exclusion for increases in hours of operation or production rate does not take the project beyond the reach of PSD coverage if those increases do not stand alone but rather are associated with non-excluded physical or operational changes.

In its March 17, 1988 letter to Region V and its July 29, 1988 letter to EPA Headquarters, WEPCO asserted that the exclusion for increases in operational hours or production rate also would serve to render PSD review not applicable to the renovation work proposed at Port Washington because the project's purpose was to restore the original design capacity of 80 megawatts per unit, but not to exceed that level. However, a plant's original design capacity is irrelevant to a determination of PSD applicability.

#### B. Significant Net Emissions Increase

Under the PSD regulations, whether the life extension project at Port Washington would result in a "significant net emissions increase" depends on a comparison between the "actual emissions" before and after the physical changes resulting from the renovation work. Where, as here, the source has not yet begun operations following the renovation, "actual emissions" following the renovation are deemed to be the source's "potential to emit" [see 40 CFR 52.21(b)(21)(iv)]. Apparently, there would be a "significant net emissions increase" within the meaning of the PSD regulations as a result of the proposed renovations as currently planned, because potential emissions after the project--reflecting the restoration of 80 megawatt capacity at each unit--would greatly exceed representative actual emissions prior to the physical changes. (The fact that the project is intended to restore the plant's original design capacity is irrelevant to that calculation.)<sup>4</sup> If this is so, the project would be a "major modification" subject to PSD review. However, PSD applies on a pollutant-specific basis, and EPA has not been furnished with adequate data regarding the impact of the proposed renovations on the various pollutants to determine whether a significant net emissions increase would indeed occur for any pollutant. Such data must be provided before EPA can make a final determination of PSD applicability.

<sup>4</sup>The WEPCO also contends (July 29, 1988 letter, page 35) that EPA should instead compare representative actual emissions prior to the change with "projected" actual emissions after the renovations. The PSD regulations provide no support for this view. Where, as here, a source is not currently subject to a PSD permit containing operational limitations, EPA must presume that the source will operate at its maximum capacity and, hence, its maximum potential to emit. However, as discussed below, a source is entitled to reduce its potential to emit by embodying its "projections" of future emissions in federally enforceable restrictions on its operations that may serve to lawfully avoid PSD review.

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It is important to note in this regard that WEPCO, at its option, could "net out" of PSD review by accepting federally enforceable restrictions on its potential to emit after the renovation. This could occur through enhancement of existing pollution control equipment, addition of new equipment, acceptance of federally enforceable operational restrictions, or some combination of these measures, limiting potential emissions to a level not significantly greater than representative actual emissions prior to the renovations. Theoretically, WEPCO could minimize the needed restrictions on its potential to emit following the renovations if it could show that some period other than the most recent two years is "more representative of normal source operation" [see 52.21(b)(21)(ii)]. (Obviously, such a showing would be most important with respect to unit 5, because it has been shut down and has had zero emissions since 1985.) Since these matters are within WEPCO's control, you should advise the company to enter discussions with Region V and Wisconsin, as appropriate, if WEPCO desires to "net out" of PSD review.

The WEPCO also argued in its July 29, 1988 letter, at pages 33-41, that even if EPA is correct that the Port Washington life extension project would involve physical changes within the meaning of the PSD regulations, any emissions increases would be due to increased production rates or hours of operation rather than higher emissions per unit of production. Therefore, WEPCO contends that these increases should be excluded from consideration in determining whether a net significant emissions increase and, hence, a major modification, would occur. The WEPCO is incorrect in this regard.

As noted above, the exclusions cited by WEPCO are intended to apply where a source increases emissions by simply combusting a larger amount of fuel, or processing a larger amount of raw materials during a given time period, or by expanding its hours of operation "to take advantage of favorable market conditions" (see 45 FR 52704). In this instance, however, it is obvious that WEPCO's plans to increase production rate or hours of operation are inextricably intertwined with the physical changes planned under the life extension project. Absent the extensive renovations proposed at Port Washington, WEPCO would have little market incentive to, and in part would be physically unable to, increase operations at these aged and deteriorated facilities which, absent the renovations, would likely be retired from service in the near future. Thus, WEPCO's plans call for precisely the type of "change in hours or rate of operation that would disturb a prior assessment of a source's environmental impact [and] should have to undergo [PSD review] scrutiny" (see 45 FR 52704). Conversely, accepting WEPCO's interpretation of the major modification regulations would serve to exclude from consideration all physical or operational changes except those which cause increased emissions per unit of production. Clearly, EPA never intended this result. It would allow, through substantial capital investment, significant expansion of the pollution-emitting capacity and longevity of major industrial facilities without PSD review of the impacts on air quality and opportunities for future economic growth.

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### C. Baseline Date

The November 9, 1987 letter from the Wisconsin Department of Natural Resources to Region V asked whether a complete March 28, 1986 PSD permit application for certain work at Port Washington triggered the PSD baseline date, despite the fact that the permit was never issued. The answer to this question is yes. Baseline dates are triggered by the first complete application and remain in effect regardless of whether the application is revised or withdrawn, or whether the permit is finally issued and the source constructed or modified.

### III. NSPS Applicability

The Port Washington renovations are subject to the Act's NSPS if they constitute "modifications" within the meaning of section 111 and 40 CFR Part 60. Under 60.1, the NSPS applies to modifications at an "affected facility." Each unit at Port Washington is properly characterized as an "affected facility" subject to the NSPS at 40 CFR Part 60, Subpart Da, which applies to electric utility steam generating units [see 60.40(a)]. Pursuant to 60.14(a), a modification for NSPS purposes is defined as "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies." Increase in emission rate is in turn defined as an increase in kilograms per hour (kg/hr) [see 60.14(b)].

Pursuant to longstanding EPA interpretations, the emission rate before and after a physical or operational change is evaluated at each unit by comparing the hourly potential emissions under current maximum capacity to emissions at maximum capacity after the change. In addition, under the Act's NSPS provisions, only physical limitations on maximum capacity are considered in determining potential emissions at power plants. Thus, any prospective changes in fuel or raw materials accompanying the physical or operational change are not considered in determining maximum capacity. Consequently, 60.14(b)(2) requires that, in conducting emissions tests before and after a change to determine whether an increase in emission rate has occurred, "operational parameters" which may affect emissions must be held constant. Fuel and raw materials are "operational parameters" for this purpose. Similarly, 60.14(e)(4) provides that use of an alternative fuel or raw material which the existing facility was designed to accommodate before the change would not be considered a modification. Thus, for example, a physical change which increases the maximum capacity of the facility would have a corresponding increase in the sulfur dioxide emissions if the facility used fuel with the same sulfur content before and after the change. Such a prospective increase cannot be offset by instead using fuel with a lower sulfur content after the change, because, under the regulations, the facility would always have the option of changing back to the higher sulfur-content fuel at a later date without triggering a modification for NSPS purposes. However, any offsetting reductions in emission rate caused by the concurrent addition of pollution control equipment would be considered in determining whether a physical or operational change results in an increase in emission rate.

CIN30B6RM0081



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The WEPCO contends (July 29, 1988 letter, at pages 20-27) that baseline capacity for the purpose of determining whether an increase in emission rate occurs for purposes of an NSPS modification is the original design capacity of the facility. This is incorrect. The thrust of the NSPS modification provisions is to compare actual maximum capacity before and after the change in question. Thus, original design capacity is irrelevant. The provision in 40 CFR 60.14(b)(2) for manual emission tests to determine whether an increase has occurred clearly contemplates that tests will be done just prior to and after the physical or operational change. The original design capacity of a unit, to the extent it differs from actual maximum capacity at the time of the test due to physical deterioration--and, hence, derating--of the facility, is immaterial to this calculation.

#### A. Physical or Operational Change

As with the Act's PSD provisions, a modification occurs for NSPS purposes, if there is either a physical or operational change [see 40 CFR 60.14(a)].

##### 1. Physical Change

As is the case under the PSD provisions, the proposed renovations at Port Washington would constitute a physical change for NSPS purposes, at least at units 2, 3, 4, and 5. The WEPCO would need to supply more information, if EPA is to make a definitive determination as to unit 1.

The rear steam drums are part of the steam generating unit which constitutes the "affected facility" within the meaning of 40 CFR 60.41(a), and the drum replacements at units 2, 3, 4, and 5 are integral to the planned increase in maximum capacity, which is the purpose of the life extension project. With respect to unit 1, other physical changes would increase maximum capacity from 45 to 80 megawatts. However, there is some question whether those changes, in significant part, would occur at the steam generating unit or will be limited to the turbine/generator set, which is not part of the affected facility. We suggest that you pursue this matter with WEPCO to the extent necessary to determine NSPS applicability regarding unit 1.

As with PSD, the NSPS regulations exclude routine maintenance, repair, and replacement [see 60.14(e)(2)]. However, the renovations at the Port Washington steam generating units are not routine for NSPS purposes for the same reasons--detailed above--that they are not routine for PSD purposes.

##### 2. Operational Change

Operational changes include both increases in hours of operation and increases in production rate. Section 60.14(e)(3) provides that an increase in hours of operation is not, by itself, a modification. However, an increase in production rate at an existing facility constitutes a modification, unless it can be accomplished without a capital expenditure on that facility [see 60.14(e)(2)].

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It is highly likely that the life extension project at Port Washington constitutes an operational change under this standard, for two reasons. First, restoring nameplate capacity at units 1, 2, 3, and 4 presumably entails, among other things, changes that will allow the units to combust a larger amount of fuel at maximum capacity through operation at higher working pressures than the units have been able to accommodate in recent years. In the case of unit 5, the renovations presumably involve an increase over zero fuel and pressure. These changes constitute an increase in production rate within the meaning of the regulations. Second, as noted above in the discussion of PSD applicability, this increase in production rate entails substantial investments to improve the capital stock at each affected facility. It appears that these investments are large enough to qualify as "capital expenditures" under the formula specified in 60.2, although WEPCO should be asked to supply actual calculations should this become necessary to determine NSPS applicability.

#### B. Increase in Emission Rate

It seems clear that, absent some creditable offsetting changes, the increases in maximum generating capacity proposed for each of the Port Washington units would represent an increase in the hourly potential emission rate for each pollutant to which a standard applies over the emission rate prior to the renovation. As noted above, burning cleaner fuels would not be creditable. Similarly, voluntarily restricting the production rate following the renovations also would not be creditable for NSPS purposes, because WEPCO could, at a later date, increase production without triggering NSPS [see 40 CFR 60.14(e)(2)]. Accordingly, to avoid triggering NSPS, WEPCO would need to install additional air pollution control equipment, or upgrade existing equipment, to offset the potential emissions increases, such that no increase would occur at maximum capacity. The information submitted indicates that WEPCO may plan some enhancement of the current control equipment, but it is unclear whether this would be adequate to prevent an increase in emission rates. As with PSD applicability, such steps can lawfully avoid NSPS requirements. Accordingly, you should advise the company that it should address these contingencies if it desires EPA to rule on whether WEPCO can avoid NSPS requirements in this fashion.

#### C. Reconstruction

Based upon data provided by WEPCO, it seems that the Port Washington renovations would not qualify as a "reconstruction" for NSPS purposes under 40 CFR 60.15, because the capital cost for the upgrades to each of the five units, while substantial, apparently is less than 50 percent of the fixed capital cost of constructing a comparable, entirely new steam generating unit [see 60.15(b)(1)]. However, the modification and reconstruction provisions of NSPS are independent. The former provisions are intended to apply in circumstances where physical or operational changes which increase emissions make NSPS coverage appropriate at levels well below 50 percent of the capital cost of a replacement unit. Conversely, the reconstruction provisions are aimed at changes to an existing unit irrespective of associated emissions

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increases, but trigger NSPS requirements only if the higher 50 percent level is reached. Thus, the suggestion made by WEPCO in its July 29, 1988 letter (at pages 14-15) that EPA must undertake rulemaking to amend the reconstruction regulations before NSPS could be applied to the Port Washington project is not well taken.

#### IV. Conclusion

In adopting the PSD and NSPS programs, Congress sought to focus air pollution control efforts at an efficient and logical point: the making of long-term decisions regarding the creation or renewal of major stationary sources. The Port Washington life extension project, as it has been presented to EPA, would involve a substantial financial investment at pollution-emitting facilities that may significantly increase potential emissions of air pollutants over a period well beyond the current life expectancy of those facilities. If the additional factual information called for in this memorandum shows that emissions increases would indeed result from this project, the project would be subject to PSD and NSPS requirements. Such a result would be in harmony with the broad policy objectives that Congress intended to achieve through these programs.

cc: Gerald Emison, OAQPS  
Alan Eckert, OGC

CIN30B6RM0084

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
	)	
and	)	
	)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE	)	
COUNCIL, and SIERRA CLUB	)	Magistrate Judge R. Steven Whalen
	)	
Plaintiff-Intervenors	)	
	)	
v.	)	
	)	
DTE ENERGY COMPANY, and	)	
DETROIT EDISON COMPANY	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF  
"ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"**

**EXHIBIT 2**

US EPA R 5 AIF & PAD

ID: F12-896-0617

MAY 24 2000 11:38 AM 004 P.02



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGIONS  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

MAY 23 2000

REPLY TO THE ATTENTION OF  
R-19J

Henry Nickel  
Counsel for the Detroit Edison Company  
Hunton & Williams  
1900 K Street, N.W.  
Washington D.C. 20006-1109

Dear Mr. Nickel:

I am responding to your request on behalf of the Detroit Edison Company for an applicability determination regarding the proposed replacement and reconfiguration of the high pressure section of two steam turbines at the company's Monroe Power Plant, referred to as the Dense Pack project. Specifically, you requested that the United States Environmental Protection Agency (EPA) determine whether the Dense Pack project at the Monroe Power Plant would be considered a major modification that would subject the project to pollution control requirements under the Prevention of Significant Deterioration (PSD) program.

We have reviewed your original request, dated June 8, 1999, and the supplemental information you submitted on December 10, 1999, and March 16, 2000. We provisionally conclude that the Dense Pack project would not be a major modification. Thus, Detroit Edison may proceed with the project without first obtaining a PSD permit. Although the Dense Pack project would constitute a nonroutine physical change to the facility that might well result in a significant increase in air pollution, Detroit Edison asserts that emissions will not in fact increase due to the construction activity, and EPA has no information to dispute that assertion.

As you know, nonroutine changes of any type, purpose, or magnitude at an electric utility steam generating unit -- ranging from projects to increase production efficiency to even the complete replacement of entire major components -- are excluded from PSD coverage as long as they do not significantly increase emissions from the source. Thus, Detroit Edison has been free to proceed at any time with the Dense Pack project without first obtaining a PSD permit as long as it adheres to its stated intention to not increase emissions as a result of the project. Indeed, EPA encourages the company to proceed with the project on this basis, since it appears to both reduce emissions per unit of output and not increase actual air pollution.

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As you are also aware, under the applicable new source review regulations, in determining if a physical change will result in a significant emissions increase at an electric utility plant, companies may use an "actual" to "representative actual annual emissions" test for emissions from the electric utility steam generating unit, under which a calculation of baseline emissions and a projection of future emissions after the change is needed. Our determination of nonapplicability is provisional because Detroit Edison has not, to our knowledge, provided a calculation of baseline emissions or projected future emissions to the permitting agency, and this should be done prior to the start of construction. The basis for this determination is summarized below and is set forth in full in the enclosed detailed analysis.

In determining whether an activity triggers PSD, the Clean Air Act and EPA's regulations specify a two-step test. The first step is to determine if such activity is a physical or operational change, and if it is, the second step is to determine whether emissions will increase because of the change. The statute admits of no exception from its sweeping scope, but EPA's regulations contain some narrow exceptions to the definition of physical or operational change. In particular, Detroit Edison claims that the Dense Pack project is eligible for the exclusion for routine maintenance, repair, and replacement. The determination of whether a proposed physical change is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors. After carefully reviewing all the information you submitted in light of the relevant factors, EPA has determined that the proposed project is not "routine."

The purpose of the Dense Pack project, to significantly enhance the present efficiency of the high pressure section of the steam turbine, signifies that the project is not routine. An upgrade of this nature is markedly different from the frequent, inexpensive, necessary, and incremental maintenance and replacement of deteriorated blades that is commonly practiced in the utility industry. For instance, past blade maintenance and replacement of only the deteriorated blades at Detroit Edison has never increased efficiency over the original design. Accordingly, because increasing turbine efficiency by a total redesign of a major component is a defining feature of the proposed Dense Pack project, it clearly goes significantly beyond both historic turbine work at Detroit Edison, and what would otherwise be considered a regular, customary, or standard undertaking for the purpose of maintaining the existing steam turbine units. The project also goes well beyond routine turbine

maintenance, repair, and replacement activities for the utility industry in general.

The nature and extent of the work in question -- replacement of the entire high pressure sections of the steam turbines for Units 1 and 4 at Monroe -- suggests that the Dense Pack project is not routine. It would result in greater efficiency above the level that can be reached by simply replacing deteriorated blades with ones of the same design and, in addition, will substantially increase efficiency over the original design. Specifically, the Dense Pack upgrade would not only restore the 7 percent of the efficiency rating lost over the years at each unit but would improve the unit's efficiency by an additional 5 percent over its original design capacity. Accordingly, the proposed project represents a significant and major redesign and replacement of the entire high pressure sections of the steam turbines at Units 1 and 4 at the Monroe facility.

The frequency with which utilities have undertaken turbine upgrades like the Dense Pack project also indicates the nonroutine nature of the changes. The information provided by Detroit Edison, regarding past history at the Monroe facility, describes what is characterized as necessary maintenance, repair, and replacement of deteriorated turbine blades approximately every 4 years. During these overhaul periods, it is not uncommon for the company to replace up to several turbine blades at one time. It is common among other utilities to also perform similar turbine maintenance. However, Detroit Edison has not provided any information to suggest that a complete replacement and redesign of the high pressure section of a steam turbine is conducted frequently at Monroe or at any other individual utility. Instead, Detroit Edison relies on its claim that projects "similar" to the Dense Pack project have been performed at a number of utilities. This information does not indicate that the replacement of the high pressure section of the steam turbine is frequent at the typical utility source; to the contrary, the only available information reflects that projects like the Dense Pack project have been performed only one time, if ever, at individual sources.

The cost of the Dense Pack project is significant and tends to indicate that this project is nonroutine. Detroit Edison expects the Dense Pack replacement to cost approximately \$6 million for each turbine unit, for a total of \$12 million. The EPA has rejected claims of routineness in past cases where the cost was substantially less than this figure. Moreover, Detroit Edison intends to capitalize the entire cost of this project, and EPA

believes that a \$12 million project that is 100 percent capital improvement indicates that it is a major undertaking.

Beyond the clearly significant absolute cost of this project, available information suggests that this expenditure far exceeds the cost typically associated with turbine blade maintenance activity. Detroit Edison provided only a summary of the total project costs for past maintenance and inspections at the facility, the total costs of which ranged from less than \$1 million to a little more than \$6 million. Although Detroit Edison did not provide any detail regarding what specific activities comprise these aggregated amounts, it acknowledges that it spent only \$18,700, \$33,100, and \$7,900 to replace high-pressure rotors in three turbine projects in 1981 and 1982. Further, the project is significantly more costly than simply replacing deteriorated blades today; Detroit Edison acknowledges that the Dense Pack upgrade would cost three times more than its alternative blade repair and replacement project. Accordingly, it appears that the costs associated with the Dense Pack project greatly exceed the amounts spent previously by Detroit Edison or that it would spend presently for the replacement of deteriorated turbine blades or rotors.

For the reasons delineated above, we conclude that the changes proposed by Detroit Edison are not routine. Detroit Edison's submissions do not demonstrate that projects such as the Dense Pack project are frequent, inexpensive, or done for the purpose of maintaining the facility in its present condition. Instead, the source relies on two principal arguments: (1) it claims that this project is less significant in scope than was the activity in question in the 1988 applicability determination for the Wisconsin Electric Power Company (WEPCO); and (2) it alleges that EPA has interpreted the exclusion for routine activity expansively to exempt all projects that do not increase a unit's emission rate. EPA rejects both of these arguments, the former because both EPA and the U.S. Court of Appeals for the Seventh Circuit viewed WEPCO's activity as "far from" routine and thus this attempted comparison to WEPCO is unsuitable, and the latter because it is demonstrably incorrect. The attached analysis addresses these points in significant detail.

When nonroutine physical or operational changes significantly increase emissions to the atmosphere, they are properly characterized as major modifications and are subject to the PSD program. In general, a physical change in the nature of the Dense Pack project, which provides for the more economical production of electricity, would be expected to result in the increased utilization of the affected units, and thus, increased



emissions. Notwithstanding the fact the Monroe units may be high on the dispatch order, the Dense Pack project would allow Detroit Edison to produce electricity more cheaply per unit of output, thereby creating an incentive to run Units 1 and 4 above current levels. Even a small increase over current normal levels in the utilization of the affected units would result in a significant increase in actual emissions of criteria pollutants. For example, in 1997, at the Monroe facility Unit 1 emitted approximately 14,000 tons of nitrogen oxides ( $\text{NO}_x$ ) and 41,000 tons of sulfur dioxide ( $\text{SO}_2$ ), and Unit 2 emitted 12,000 tons of  $\text{NO}_x$  and 35,000 tons of  $\text{SO}_2$ . Based on this information, if a one to five percent increase in operation were to result from the Dense Pack project, increases on the order of 160-800 tons of  $\text{NO}_x$  and 400-2000 tons of  $\text{SO}_2$  would occur.

Detroit Edison, however, maintains that emissions will not increase as a result of the Dense Pack project. Specifically, the company contends that representative actual annual emissions following the change will not be greater than its pre-change actual emissions, because the Dense Pack upgrade will not result in increased utilization of the units. As you are aware, the PSD regulations (under the provisions commonly known as the "WEPCO rule") allow a source undertaking a nonroutine change that could affect emissions at an electric utility steam generating unit to lawfully avoid the major source permitting process by using the unit's representative actual annual emissions to calculate emissions following the change if the source submits information for 5 years following the change to confirm its pre-change projection. In projecting post-change emissions, Detroit Edison does not have to include that portion of the unit's emissions which could have been accommodated before the change and is unrelated to the change, such as demand growth.

Under the WEPCO rule, Detroit Edison must compute baseline actual emissions and must project the future actual emissions from the modified unit for the 2-year period after the physical change (or another 2-year period that is more representative of normal operation in the unit's modified state). As noted above, Detroit Edison has not provided these figures to verify its projection of no increase in actual emissions, and should submit them to the Michigan Department of Environmental Quality prior to beginning construction. In addition, Detroit Edison must maintain and submit to the permitting agency on an annual basis for a period of at least 5 years (or a longer period not to exceed 10 years, if such a period is more representative of the modified unit's normal post-change operations) from the date the units at the Monroe Plant resume regular operation, information demonstrating that the renovation did not result in a significant emissions

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increase. If Detroit Edison fails to comply with the reporting requirements of the WEPCO rule or if the submitted information indicates that emissions have increased as a consequence of the change, it will be required to obtain a PSD permit for the Dense Pack project.

Finally, regardless of whether PSD review is triggered due to the Dense Pack project, Detroit Edison must meet all other applicable federal, state, and local air pollution requirements.

This determination will be final in 30 days unless, during that time, Detroit Edison seeks to confer with or appeal to the Administrator or her designee regarding it. If you have any questions regarding this determination, please contact Laura Hartman, Environmental Engineer, at (312) 353-5703, or Jane Woolums, Associate Regional Counsel, at (312) 886-6720.

Sincerely,

/s/ original signed by  
Francis X. Lyons

Francis X. Lyons  
Regional Administrator

Enclosure

US EPA R 5 AIR & RAD ID:313-836-0517

MAY 24 '00 11:44 No.004 P.08

7

cc: Peter Marquardt, Esq., Special Counsel  
Detroit Edison Company  
2000 Second Avenue - 688 WCB  
Detroit, Michigan 48336

Russell Harding, Director  
Michigan Department of Environmental Quality

**ENCLOSURE**  
**DETROIT EDISON APPLICABILITY DETERMINATION**  
**DETAILED ANALYSIS**

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## I. Introduction

If a company intends to construct a major source or a major modification at a source, that source is required to obtain a major new source review permit before beginning construction. If a source questions whether a change is subject to major new source review, the source can request an applicability determination. In this case, Detroit Edison Company has requested an applicability determination from the United States Environmental Protection Agency (EPA). This analysis outlines EPA's decision on the applicability determination for Detroit Edison's proposed project.

## II. Summary of Request and Brief Conclusion

Detroit Edison Company is proposing to replace and reconfigure the high pressure portion of two steam turbines at its Monroe Power Plant. The company refers to this project as the "Dense Pack" project. In general, the Dense Pack project would consist of replacing and reconfiguring all of the blades in the high-pressure section of two turbines to substantially increase plant efficiency and reduce maintenance costs. On June 8, 1999, Henry Nickel, Hunton & Williams, submitted on behalf of Detroit Edison a request that EPA determine whether the Dense Pack project would be a "major modification" to the Monroe source, subject to the Prevention of Significant Deterioration (PSD) requirements of the New Source Review (NSR) program. An activity is a major modification and requires a PSD permit if it constitutes a nonexempt physical or operational change and if it results in a significant net increase in emissions. Detroit Edison claimed that the proposed Dense Pack project at two units in Detroit Edison's Monroe Power Plant would not be a "physical change," as the PSD regulations use that term, but instead would qualify for an exemption from the definition of "physical change" under the exclusion for routine maintenance, repair, and replacement. In the alternative, Detroit Edison maintained that the change would not result in an emissions increase that would trigger PSD.

In a letter dated June 25, 1999, EPA wrote Mr. Nickel acknowledging receipt of the request. In another letter to Mr. Nickel dated July 12, 1999, EPA requested more information regarding the proposed Dense Pack project and Detroit Edison's arguments in order to proceed with the review. On December 10, 1999, Mr. Nickel submitted information in response to EPA's July 12th request. In addition, on March 16, 2000, Detroit Edison submitted another letter, along with additional supporting materials. The following summarizes EPA's review of the proposed Dense Pack project based upon these submissions.

EPA has provisionally determined that PSD would not apply at this time if Detroit Edison were to construct the Dense Pack upgrade as described. The project would entail substantial, infrequently performed, and costly construction for the purpose of increasing the source's generating capacity both beyond its prior design and its current capacity. Accordingly, EPA finds that the upgrade is a "physical change," as that term is used in the Clean Air Act (CAA) and its implementing regulations. The Agency rejects Detroit Edison's claim that the project

qualifies for the exemption for routine maintenance, repair, and replacement, because our analysis of the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, leads us to conclude that the project is not "routine" as EPA has historically interpreted that regulatory term. In addition, because the Dense Pack project will substantially increase the operational and economic efficiency of the Monroe facility, EPA finds that the project provides an incentive to significantly increase utilization, and thus, emissions. Detroit Edison has stated, however, that emissions at the plant will not in fact increase as a result of the Dense Pack upgrade, and EPA has no specific information to dispute that assertion. Accordingly, EPA provisionally accepts Detroit Edison's assertion of no emissions increase. However, to establish that no emissions increase will result and that PSD does not apply, the regulations applicable to electric utility steam generating units call for a calculation of baseline actual emissions and a projection of future actual emissions. Thus, before beginning construction on the project, Detroit Edison should provide this calculation and projection to the permitting agency to affirm its assertion of no emissions increase.

### III. Factual Background

#### A. Current Conditions

Detroit Edison's Monroe Power Plant contains four coal-fired boilers, along with four associated steam turbines. The turbines convert the steam generated in the boilers into electric energy, using a system of blades or buckets to convert the energy stored in the steam from the boilers into mechanical energy. This mechanical energy is then transferred to an electric generator. The Dense Pack project is being proposed for two of the four turbines, Units 1 and 4. Units 1 and 4 began operating in 1971 and 1974, respectively. Both units have nominal ratings of 750 megawatts. Currently, the units at Detroit Edison's Monroe Plant, along with those at its Belle River Power Plant, are very high in the loading order for fossil fuel generation in the Detroit Edison system. Detroit Edison claims that, as a result, it has operated Units 1 and 4 at or near maximum capacity over the past five years. Specifically, between 1995 and 1998, the capacity factors for Unit 1 and Unit 4 have been 82.8%, 62.7%, 87.8%, 83.5%, and 63.0%, 82.2%, 79.6%, 87.4%, respectively.

According to submitted information, Detroit Edison shuts down the electric generating units and performs inspections approximately every four years. In addition to other work on other portions of the facility, Detroit Edison performs necessary maintenance, repair, and replacement of individual deteriorated turbine blades at that time. Historically, the source has not had to repair or replace blades in the high pressure section of the turbines every time it inspected them, but such maintenance, including piecemeal repair or replacement, occurs periodically. Detroit Edison states that these scheduled outages typically last a minimum of six weeks, but does not specify how much of this time is devoted to the repair and replacement of worn blades. In general, repair or replacement of the turbine blades could be to maintain fuel efficiency, reliability, safety, or generating capacity, or to comply with regulatory requirements, insurance company requirements, corporate practices, or other reasons. It appears from

individual inspection reports that maintaining efficiency was the stated reason for most inspections and maintenance.

According to Detroit Edison, the turbines at Units 1 and 4 currently are operating at 7% below their original efficiency ratings due to accumulated deterioration in the high-pressure turbine blades. Replacement of the deteriorated blades with blades of the same design would replace only 2% of the lost efficiency, leaving the units 5% below their original efficiency rating. Detroit Edison estimates the cost of replacing only the currently deteriorated blades to be approximately \$2 million per unit. Detroit Edison provided only a summary of the project costs for past maintenance and inspections at the facility, the total costs of which ranged from less than \$1 million to a little more than \$6 million. Detroit Edison spent \$18,700, \$33,100, and \$7,900 to replace high-pressure rotors in three projects in 1981 and 1982. Detroit Edison has not provided other specific cost information regarding the cost of on-site blade repair and replacement or similar information for the utility industry as a whole.

#### **B. Proposed Dense Pack Project**

Detroit Edison is proposing to replace the entire high-pressure sections of two turbines to allow for the use of a new type of turbine blade and to reconfigure the design in order to improve efficiency and reduce maintenance costs. To install the Dense Pack, Detroit Edison must shut down the units. Detroit Edison expects the installation to take approximately 44 days, and plans to complete the installation during the time normally allotted for turbine outages. Installation of the Dense Pack would involve replacement and reconfiguration of blades in the high-pressure sections of the two units, using rotors and casings to support the new blade configuration. In addition, the Dense Pack would use a newer, substantially improved type of blade than is currently in use at the Monroe facility.

As noted above, Detroit Edison states that the high pressure sections of the turbines at Units 1 and 4 are operating at 7% below their original efficiency ratings due to accumulated deterioration in the high-pressure section of the turbines. The Dense Pack project would increase efficiency of the high-pressure sections of the turbines over current levels by 12%, restoring the 7% lost efficiency at the high pressure section and improving the efficiency of the high-pressure section by 5% over the original design. This increased efficiency in the high-pressure sections would increase the overall efficiency of each of the turbines by 4.5%. In addition, the new Dense Pack configuration could reduce efficiency deterioration by 70%. Therefore, Detroit Edison expects the inspections and needed repair or replacements to occur once every 10 years, instead of once every 4 years.

Detroit Edison expects the Dense Pack project to cost approximately \$12 million. Detroit Edison plans to capitalize 100% of the cost of the Dense Pack project.

#### IV. Physical Change/Change in the Method of Operation

Before providing its analysis of whether the Dense Pack project would constitute a physical or operational change, EPA believes it would be useful to review what the statute and regulations require and how they have been applied historically. Thus, the following discussion provides a context for the analysis of the project that follows.

##### A. Statutory and Regulatory Requirements

###### 1. Overview

Both the CAA and the NSR regulations require a physical or operational change to occur before any particular activity is considered a "modification" which triggers new source requirements. The applicable provisions do not, however, define what constitutes a physical or operational change. EPA historically has acknowledged -- in view of these undefined broad statutory and regulatory terms -- that they could "encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way that pipe is utilized)." 57 Fed. Reg. 32314, 32316 (July 21, 1992). Recognizing that Congress did not intend everything undertaken at a stationary source to be subject to new source requirements, *id.*, EPA has long exempted certain narrow classes of activities from being considered physical or operational changes. *Accord Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1980) (although "the term 'modification' is nowhere limited to physical changes exceeding a certain magnitude," EPA possesses the authority to provide exemptions from the definition where they are of *de minimis* benefit or where administratively necessary). There are several such exclusions, but only one is at issue in the present case<sup>1</sup> -- the exclusion for "routine"

1. Detroit Edison suggests that the Dense Pack replacement project is also exempt from PSD as a pollution control project, *see, e.g.*, 40 C.F.R. § 52.21(b)(2)(iii)(h), because the source anticipates that the project will decrease the units' emissions on a per-unit-of-output basis. December 10 Letter at 2; March 16 Letter at 3. This claim is not substantiated in any of Detroit Edison's correspondence with the Agency. Our analysis above accordingly focuses on Detroit Edison's primary claim -- that its activity is routine. At the same time, however, EPA does not want to give the impression that it tacitly agrees with Detroit Edison's claimed exemption; to the contrary, the Dense Pack replacement project does not meet the definition of "pollution control project" in the regulations. *See* 40 C.F.R. § 52.21(b)(2)(iii)(h), (b)(32). Moreover, virtually any major capital improvement project at an existing source is designed in part to increase efficiency of production, and this will in turn almost always have the collateral effect of reducing emissions per unit of production, even though it may provide an economic incentive to increase total production, with the net result that actual emissions of air pollution to the atmosphere could increase significantly. There is nothing in the statutory terms or structure or in EPA's regulations which suggests that such major changes should be accorded exempt status under the NSR program. To the contrary, major capital investments in industrial equipment, where they

(continued...)



activity

## 2. Scope of Exclusion for Routine Activity

### a. Statutory and Regulatory Text

The starting point for analysis of any exemption is the language of the statute and governing regulations. Section 111(a)(4) of the CAA reads as follows:

The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

CAA § 111(a)(4). The CAA requires a PSD permit prior to "construction" of a major stationary source of any pollutant for which the area in which the source is located is designated attainment or unclassifiable, *id.* § 165(a), and it defines "construction" as including modifications (as defined in section 111) to existing facilities. *Id.* § 169(2)(C). EPA's regulations generally track the statute:

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase . . .

E.G., 40 C.F.R. § 52.21(b)(2).<sup>2</sup> The plain language of these statutory and regulatory requirements

#### 1. (...continued)

could result in an increase in emissions, appear to be precisely the type of change at an existing source that Congress intended should be subject to PSD and nonattainment area NSR permitting. See Prevention of Significant Deterioration and Nonattainment New Source Review; Proposed Rule, 61 Fed. Reg. 38250, 38262 (July 23, 1996) ("NSR Reform" proposed rulemaking). See also Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 297-98 (1<sup>st</sup> Cir. 1989) (modification of emissions unit that decreases emissions per unit of output, but may result in sufficient production increase such that actual emissions will increase, is subject to PSD). Conversely, nonroutine and otherwise nonexcluded changes of any type, regardless of whether they are projects such as the Dense Pack intended to increase production efficiency, or even the complete replacement of an entire industrial plant, are excluded from PSD coverage so long as they do not result in significant emissions increases. See *infra* note 4.

2. In this determination, EPA refers interchangeably to the "PSD" and "NSR" programs. There are multiple sets of PSD and NSR regulations, governing the general (or "minor") program  
(continued...)

indicates their sweeping scope. Both the CAA and its implementing regulations define "modification" as including any physical or operational change. See 42 U.S.C. § 7411(a)(4), CAA § 111(a)(4); see also, e.g., 40 C.F.R. § 52.21(b)(2)(i). In light of that breadth, any regulatory exemption from the statutory and regulatory requirements should be interpreted in a limited way. See Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901, 908-09 (7<sup>th</sup> Cir. 1990) ("WEPCO") ("courts considering the modification provisions of NSPS and PSD have assumed that 'any physical change' means precisely that").<sup>3</sup>

## 2. (...continued)

and the programs for major sources in attainment and nonattainment areas, and governing those programs where EPA is the permitting authority and those where the state is the permitting authority. For ease of use, this document refers to only the applicable requirements here, 40 C.F.R. § 52.21. Those requirements apply where, as here, the state does not have an approved PSD program in its state implementation plan and the federal PSD program regulations apply instead. See id. § 52.1180. EPA has delegated implementation of the PSD program to Michigan, which issues federal PSD permits on EPA's behalf. See id. § 52.21(u). It bears noting, however, that EPA regulations governing approved PSD programs and NSR programs for nonattainment areas also contain an identically worded exclusion for routine activity. In addition, the regulations governing EPA's new source performance standards (NSPS) contain a similar exemption for routine activity. Accordingly, the discussion below does not differentiate between the two programs, and relies upon relevant NSPS precedents as instructive in the NSR program. See 57 Fed. Reg. at 32316 (noting that physical/operational change step "is largely the same for NSPS and NSR"). The most significant difference between the programs' definition of "physical change" is that the NSR regulations do not require a source to affirmatively seek an applicability determination to be exempt as a routine change, id. at 32332, but the NSPS regulations plainly do. 40 C.F.R. § 60.14(c)(1) (activity is exempt if it is "[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category"). In all respects relevant to this determination, however, the regulations are identical.

3. There is a rule of law that exclusions from generally applicable regulations should be construed narrowly. See Auer v. Robbins, 519 U.S. 452, 462-63 (1986) (recognizing general rule of construction for regulations); see also O'Neal v. Barrow County, 980 F.2d 674, 677 (11<sup>th</sup> Cir. 1993) (where statute does not provide for exemption, regulations providing for one should be narrowly construed). Similarly, regulatory provisions should be read in conjunction with the statutes from which they are derived and with other similar provisions. Thus, just as other exclusions from the new source provisions are limited to narrow circumstances, one should read the exclusion for routine activity similarly. See, e.g., 40 C.F.R. §§ 52.21(b)(2)(iii)(b)-(e) (governing the use of alternative fuels when the source is ordered to do so pursuant to certain federal laws, when the fuel is derived from municipal solid waste, when allowed by existing permit, or when the source was capable of accommodating it before January 6, 1975 and is not prohibited from using it by a subsequent federally enforceable permit term); 52.21(b)(2)(iii)(g) (excluding changes in ownership of the stationary source).

The requirement that a source both make a physical or operational change and increase emissions to be considered a modification further suggests that the physical or operational change prong of the test should be broadly construed. The statute grandfathers existing facilities from the expense of state-of-the-art controls, but not permanently. Rather, the CAA effected a balance of concerns; if plants were modified – i.e., physically or operationally changed in a manner that increased emissions – the grandfather status would be lost, and NSR would apply. The requirement that there be a net increase in emissions at a source before a modification is deemed to have occurred, however, makes the grandfather provision potentially quite broad.<sup>4</sup> Indeed, this limitation on the modification rule has been viewed by EPA as open-ended – the grandfather status can be permanent so long as emissions do not increase – and environmental groups have long complained of this NSR “loophole.”

It is against that statutory and regulatory backdrop that EPA adopted the exclusion for routine activity. It provides:

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair, and replacement. . . .

40 C.F.R. § 52.21(b)(2). The text of the routineness exclusion itself conveys the narrowly limited scope of the exemption. Because the regulations provide no definition of “routine,” nor does the preamble of the notice promulgating the exclusion contain a discussion that would give the exemption a particular meaning for the NSR program, the regulatory term should be used in its ordinary sense. Webster’s defines “routine” as “of a commonplace or repetitious character”; “of, relating to, or being in accordance with established procedure.” These definitions suggest that determining routineness appropriately involves considering whether the activity is frequent (is it “repetitious”), whether it is of significant scope (is it “commonplace”), and whether it is for a customary purpose or is being accomplished in a customary fashion (is it “in accordance with established procedure”).

#### D. Applicability Determinations and Other EPA Actions Construing Routineness

In formal NSR applicability determinations, EPA has consistently interpreted the exclusion for “routine” activities narrowly. The Agency’s most comprehensive discussion of the exclusion came as part of an applicability determination for WEPCO’s Port Washington utility

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4. See, e.g., *Alabama Power Co. v. Costle*, 636 F.2d 323, 401 (D.C. Cir. 1979) (requiring EPA to allow replacement of depreciated capital goods without a PSD permit where no increase in emissions at the source would result, due to offsetting decreases, because “Congress wished to apply the permit process . . . only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase.”)

5. See, e.g., Comments of NRDC on NSR Reform proposed rulemaking (63 Fed. Reg. 39857, Notice of Availability, July 24, 1998), EPA Docket No. A-90-37, Oct. 8, 1998.

life extension project, which was upheld by the United States Court of Appeals for the Seventh Circuit. As in the present case, EPA's analysis began with the breadth of the modification provision, turning next to "the very narrow exclusion provided in the regulations," that is, the exclusion for "routine" activity. See Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to David A. Kee, Air and Radiation Division, Region V, at 3 (Sept. 9, 1988) (Clay Memo). EPA then described the core test for meeting this exclusion: "In determining whether proposed work at an existing facility is 'routine,' EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding." *Id.* Applying these commonsense factors, the Agency concluded that the WEPCO project was "far from being a regular, customary, or standard undertaking for the purpose of maintaining the plant in its present condition." *Id.*<sup>6</sup>

The WEPCO determination and subsequent court case led to significant national attention, Congressional hearings, and statutory and regulatory changes, but neither the provisions regarding routine activity nor EPA's interpretation of those provisions were affected.

Beyond the WEPCO decisions, EPA has given further guidance in other NSR and NSPS applicability determinations and related actions which elaborate on the preceding factors.<sup>7</sup> For example, in a 1987 applicability determination regarding the reactivation of a roaster/leach/acid plant at the Cyprus Casa Grande Corporation's copper mining and processing facilities, EPA determined that the proposed project would constitute a "major modification," and did not fall into the "narrow and limited set of exclusions" from PSD, including the exclusion for routine activity. See Letter from David P. Howekamp, Director, Air Quality Management Division, Region IX, to Robert T. Connery, Esq., at 3-4 (Nov. 6, 1987). In particular, EPA concluded that

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6. Specifically, WEPCO proposed to modify its facility in a way that would replace numerous major components of the facility (including the steam drums), would require pre-approval from the state utility commission, would significantly enhance the efficiency and current production capacity of the plant and extend its useful life, would rarely be repeated during a unit's life, and would cost a substantial amount of money, over half of which was designated as capital costs. *Id.* at 4-6. On review, the Seventh Circuit upheld this portion of EPA's determination in its entirety. See *WEPCO*, 893 F.2d at 910-13.

7. In addition to the guidance discussed above, EPA's narrow interpretation of the exclusion for routine activity is evident from a passage in its brief to the Seventh Circuit in *WEPCO*. That brief generally reiterates the points addressed in the applicability determination that was the subject of the litigation, but elaborates with a helpful example. EPA analogized industrial facilities to automobiles, emphasizing that the "regulatory exception for routine, maintenance, repair and replacement was meant to cover such things as an oil change, replacing a broken headlamp or worn-out tires, changing the sparkplugs, or other similar activities," rather than permitting the replacement of such items as the engine or transmission. Respondent's Brief at 51, *WEPCO v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (Nos. 88-3264 & 89-1339).

because the project called for the replacement of integral components and would entail significant time (4 months) and cost (an absolute cost of \$905,000, which constituted 10 percent of the cost of replacing the repaired unit), it was not routine. *Id.* at 5-6. The agency also noted that certain activities, although they would be routine "if performed regularly as part of standard maintenance procedure while the plant was functioning or in full working order," were being performed as part of an extensive rehabilitation project and, thus, were properly considered non-routine. *Id.* at 6; see also *In re: Monroe Electric Generating Plant*, Petition No. 6-99-2 at 11, 19 & n. 19 (Adm'r 1999) (in grant of CAA § 505(b)(2) veto petition, stating principle that a non-routine collection of activities, considered 'as a whole,' is not exempt under routine exclusion, even if individual activities could be characterized as routine). In another case, in 1975, EPA Region X determined that the upgrade of boilers at a pulp mill was non-routine under NSPS, in that it called for the addition of additional pressure parts previously not included in the boilers to increase the superheater surface of the boilers, even though the additional parts were contemplated under the original boiler design. Request for Ruling Regarding Modification of Weyerhaeuser's Springfield Operations, Reg. Counsel, Reg. X (Aug. 18, 1975). When reviewing whether a project was routine, other applicability determinations have considered whether the project involved: (1) the addition of certain parts previously not included in the units; (2) the expansion of parts of a unit; or (3) the replacement of an entire emissions unit. For copies of these actions and other applicability determinations and guidance documents, please see EPA's publicly-available databases, available at: <http://www.epa.gov/ttn>; <http://www.epa.gov/region07/programs/airtd/air/nsr/nsrpg.htm>; and <http://www.epa.gov/oeca/epddd/adi.html>, or contact the staff members named in the cover letter.

In sum, in these actions and elsewhere, EPA has assessed routineness by considering the following factors:

#### Nature

- Whether major components of a facility are being modified or replaced; specifically, whether the units are of considerable size, function, or importance to the operation of the facility, considering the type of industry involved
- Whether the change requires pre-approval of a state commission, in the case of utilities
- Whether the source itself has characterized the change as non-routine in any of its own documents
- Whether the change could be performed during full functioning of the facility or while it was in full working order
- Whether the materials, equipment and resources necessary to carry out the planned activity are already on site

#### Extent

- Whether an entire emissions unit will be replaced
- Whether the change will take a significant time to perform
- Whether the collection of activities, taken as a whole, constitutes a non-routine effort, notwithstanding that individual elements could be routine

- Whether the change requires the addition of parts to existing equipment

#### Purpose

- Whether the purpose of the effort is to extend the useful life of the unit; similarly, whether the source proposes to replace a unit at the end of its useful life
- Whether the modification will keep the unit operating in its present condition, or whether it will allow enhanced operation (e.g., will it permit increased capacity, operating rate, utilization, or fuel adaptability)

#### Frequency

- Whether the change is performed frequently in a typical unit's life

#### Cost

- Whether the change will be costly, both in absolute terms and relative to the cost of replacing the unit
- Whether a significant amount of the cost of the change is included in the source's capital expenses, or whether the change can be paid for out of the operating budget (i.e., whether the costs are reasonably reflective of the costs originally projected during the source's or unit's design phase as necessary to maintain the day-to-day operation of the source)

These categories are interrelated. Many facts could be relevant to both nature and extent, while others could overlap with purpose. Moreover, none of these factors -- standing alone -- conclusively determines a project to be routine or not. Instead, a permitting authority should take account of how each of these factors might apply in a particular circumstance to arrive at a conclusion considering the project as a whole.

### **3. Analysis of Detroit Edison's Objections to EPA's Longstanding, Narrow Interpretation of the Exclusion for Routine Activity**

In support of its request, Detroit Edison has submitted a number of documents in which members of the electric utility industry claim that EPA has recently changed its interpretation of the routineness exclusion by narrowing it and that EPA's prior interpretation was expansive. See, e.g., Supplemental Comments of the Utility Air Regulatory Group, EPA Air Docket No. A-90-37 (Oct. 8, 1999) (UARG Comments).<sup>8</sup> As discussed below these arguments lack merit. Moreover, it bears noting that if companies have specific questions about the scope of the exclusion, EPA has long encouraged sources to seek guidance from their permitting authorities, see New Source Review Workshop Manual at A.33-34 (Draft Oct. 1990).

8. The UARG comments submitted by Detroit Edison in support of its applicability determination request pertain to the ongoing "NSR Reform" rulemaking. See 61 Fed. Reg. 38250 (1996). The views expressed here regarding the UARG Comments pertain only to this applicability determination and are without prejudice to the ultimate outcome of the pending rulemaking.

**a. Claim that Construction that Does Not Increase Unit's Emission Rate Is Routine**

Among Detroit Edison's contentions is the assertion that the routine activity exclusion is properly read (and historically has been read by EPA) to cover all "capital projects to replace degraded components without increasing the design capacity or maximum achievable hourly emission rates." See UARG Comments at 43. This interpretation would leave NSR to cover only "those activities that would create 'new air pollution' by significantly increasing the pollutant emitting capabilities of the source as designed and built." *Id.* at 13. In essence, this argument holds that extensive construction activity at a source is exempt from new source requirements, even if actual emissions to the atmosphere increase, where the source's potential to emit does not increase. This contention does not withstand scrutiny. EPA's regulations have since 1980 explicitly required keying NSR applicability for modifications to the actual emissions consequences of a particular change. See, e.g., 40 C.F.R. §§ 52.21(b)(2)(i) (defining "major modification" as a change resulting in a significant "net emissions increase"); 52.21(b)(3)(i) (defining "net emissions increase" based on "actual emissions"); see also 45 Fed. Reg. 52676, 52700 (Aug. 7, 1980) (explaining EPA's adoption of actual emissions baseline for modifications). Industry has understood this facet of the NSR program from the outset; indeed, it was one of the central points on which industry sought review of the 1980 regulations. See Brief for Industry Petitioners on Actual Emissions Definition of Net Increase, Chemical Mfrs. Ass'n v. EPA (D.C. Cir.) (No. 79-1112). Accepting Detroit Edison's proffered interpretation of the routine activity exemption, however, would moot this longstanding and contentious quarrel and would make meaningless the provisions in the regulations governing the actual emissions baseline for modifications. This runs counter to the general presumption that interpretations that render part of a regulation superfluous are to be avoided. See, e.g., *U.S. v. Larson*, 110 F.3d 620, 626 (8th Cir. 1997); accord *WEPCO*, 893 F.2d at 909 (rejecting WEPCO's proffered definition of "physical change," because it "would open vistas of indefinite immunity from the provisions of NSPS and PSD").

**b. Mary Nichols Representation that "Restoration" Activity Can Be Routine**

9. The argument that only changes that increase a unit's emissions rate can trigger the NSR modification provisions has been rejected by two courts of appeals. As noted, *see supra* note 1, in *Puerto Rican Cement*, the First Circuit rejected a claim that modifications to a cement kiln, which made production more efficient and decreased the hourly emissions rate but could increase the plant's utilization rate, such that actual emissions to the atmosphere might increase, were exempt from PSD. The company argued that the project fell under the PSD regulatory exclusion for changes that result in an "increase in the hours of operation or in the production rate." See 889 F.2d at 298. Similarly, in *WEPCO*, where the company was making "like-kind" replacements of components to restore the original design capacity of the plant, there was no increase in emissions per unit of output; rather, for PSD purposes, the emissions increase was attributable to increased utilization. The Seventh Circuit rejected the company's reliance on the exclusion for increased hours of operation/rates of production. See 893 F.2d at 916 n. 11.

In the submitted materials, utility representatives claim that EPA has previously indicated that the utilities may undertake facility restorations without considering NSR. In 1995, industry encouraged EPA to propose to amend the NSR rules to include a "restoration" exclusion for any change that enabled a deteriorated unit to increase its emissions, as long as the unit did not exceed its highest recent (i.e., in the last 5 years) achievable capacity. EPA responded by saying that it intended to propose a number of flexible mechanisms to allow sources to make changes without triggering NSR. The Agency also said, "EPA believes that the routine maintenance exclusion already included in the existing NSR regulations also has the effect of excluding 'routine restorations.'" Letter from Mary D. Nichols, Assistant Administrator for Air and Radiation, to William R. Lewis, Morgan, Lewis and Bockius, attachment at 19 (May 31, 1995). Some in industry quarters suggest that this sentence indicates EPA's interpretation that restoration activities are, by definition, exempt. See UARG Comments at 17 ("In 1995, [EPA] confirmed that no special rule was needed for industrial 'restoration' projects because such projects were covered already under the 'routine maintenance' exclusion."). These claims are incorrect. Rather, EPA's statement says merely that "routine restorations," not all "restorations," are exempt. Thus, EPA's remark simply is tautological; it says that to the extent the restoration is itself "routine," the current exclusion for "routine" activity will exempt it from review.<sup>10</sup>

**c. Assertion that EPA Expects No Change to Trigger NSPS Modification Provision**

Detroit Edison also maintains that several EPA documents indicate that the Agency believed until recently that utility modifications would generally avoid NSR, and that these documents therefore reveal an expansive understanding of the exemption for routine activity. In particular, the UARG Comments highlight a General Accounting Office (GAO) report created when Congress was considering the acid rain program,<sup>11</sup> a letter to Senator Byrd from EPA regarding a proposed NSPS, and the preamble to the proposed NSPS.<sup>12</sup> Although none of these documents discuss the scope of the routine maintenance, repair, and replacement exemption,

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10. For example, past piecemeal repairs and replacement of individual rotor blades at Monroe presumably restored some portion of the efficiency lost since the last scheduled outage. While not the subject of this determination, it appears that those activities -- which as explained above were far different from the proposed Dense Pack upgrade -- are more likely to be properly characterized as excluded "routine restorations."

11. UNITED STATES GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-90-200, ELECTRICITY SUPPLY: OLDER PLANTS' IMPACT ON RELIABILITY AND AIR QUALITY (1990).

12. The submissions also refer to an article written by EPA staff. This document warrants no discussion; it does not represent Agency opinion, as noted in the cited article. See James DeMocker et. al, Extended Lifetimes for Coal-fired Power Plants: Effect Upon Air Quality, PUBLIC UTILITIES FORTNIGHTLY at 30 n.\* (Mar. 20, 1986). Moreover, the article is silent on the question at issue here -- when certain activity is routine -- and therefore would not be relevant even if it did speak for EPA.



industry points to them as evidence that EPA believed that NSR would apply to electric utilities only rarely.

The cited documents do not remotely suggest a broad EPA interpretation of the routineness exemption. First, although the GAO report contains a number of statements that suggest that EPA did not expect many utilities to trigger the NSPS or PSD modification rules, it does not suggest how broadly or narrowly the exclusion for routine activity has been interpreted; further, some statements in the report are best read as reflecting a narrow scope to the exclusion. GAO Report at 28, 30 (acknowledging that "life extension projects involve physical or operational changes to power plants" and distinguishing between projects aimed at restoring generating capacity and those which prevent plant deterioration). In addition, as noted above, the PSD regulations provide broad leeway for sources to avoid new source requirements by making offsetting emissions reductions at the source even when undertaking extensive physical or operational changes that, standing alone, would result in emissions increases. In many circumstances, such "netting out" of review is a more cost-effective strategy than obtaining a PSD permit. Moreover, at the time of the 1990 CAA Amendments, any statement or assumption EPA made regarding whether electric utilities could trigger NSR was based on information provided by industry at that time. The power plant undertaking a physical or operational change is responsible for obtaining the necessary regulatory approvals from each agency that regulates it. State and federal environmental agencies do not regularly review submissions to public utility commissions, the Federal Energy Regulatory Commission, a pipeline authority or a local zoning board; nor are those agencies charged with the authority to require CAA permits. As a result, EPA, as well as states, were unaware that activities that were under way at utilities would in fact increase emissions and thus trigger NSR. Although EPA's conclusions were reasonable based on the information EPA had at the time, EPA's statements might have been different based on more complete information, including information from facilities requesting applicability determinations.

Second, the utilities point to a letter to Senator Byrd from OAQPS Director John Seitz regarding potential revisions to the NSPS for steam generating units and to the preamble to a 1997 proposed rule on the same topic. Both documents indicate that EPA expected few, if any, existing units to become subject to the proposed NSPS as a result of being modified. Again, these documents do not suggest that the reason EPA had such an expectation was because of a broad interpretation of the exemption for routine activity. Indeed, the preamble to which industry refers has a lengthy discussion of the reasons why existing units would avoid the NSPS for modifications, but notably omits the "routine" exclusion. See 62 Fed. Reg. 36947, 36957 (July 9, 1997).<sup>13</sup>

13. In addition, the UARG Comments claim that a "key" factor in the D.C. Circuit's recent vacatur of the fossil-fuel boiler NSPS for modified units was that some EPA offices viewed quite a bit of "maintenance" activity as potentially covered by the modification provision and others thought that few, if any, changes would trigger the NSPS. UARG Comments at 3 n.8. (continued...)

**d. Assertion that Industry Practice Defines Routineness**

The submitted materials also seem to contend that if a particular industry sector has an established practice of undertaking certain construction activity, no matter how infrequent, costly, or major, that industry practice is "routine." See UARG Comments at 37 ("[E]lectric utilities undertake maintenance, repair and replacement activities pursuant to their legal obligation to provide a safe and reliable source of electricity. This defines what is 'routine' for this industry.") It is true that EPA has stated that the "determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category." 57 Fed. Reg. at 32326. However, this statement merely recognizes that a piece of equipment may be more integral, costly, or less frequently replaced at one kind of facility than at another. Accordingly, although it may not be routine for one industry to replace or repair certain equipment or undertake certain maintenance activity, similar construction might be routine in a different industry. As a result, EPA has historically considered whether a typical source in the relevant industry undertakes the proposed activity as a routine matter. See, e.g., 40 C.F.R. §60.14(e)(1) (NSPS regulations require EPA determination that activity is "routine for a source category" to be exempt). This does not mean, however, that whatever activity members of a particular industry have done – no matter how infrequent, costly, sizable, or capable of expanding the source's operations or extending its useful life – is necessarily routine.

**B. Analysis of "Routine" Maintenance, Repair or Replacement at the Monroe Plant**

Looking at the nature, extent, purpose, frequency and cost of the project, along with other relevant factors in light of the framework discussed above, EPA concludes that the proposed Dense Pack project is a non-routine physical change. In sum, although utilities typically perform maintenance, repair and replacement of individual deteriorated turbine blades about once every four years, the reconfiguration and upgrade of a turbine's entire high-pressure section (including all of the blades) is a significant departure from necessary maintenance operations aimed at keeping the turbine in ordinary working condition, and is rarely performed at a typical utility. Detroit Edison expects the new Dense Pack configuration to substantially increase the unit's ability to convert steam to electricity over its original design and the project will reduce the rate of blade efficiency deterioration by 70%. Moreover, the new blades will alter the inspection and replacement program of worn blades, allowing inspection and replacement to occur every 10

**13. (...continued)**

Research has revealed no support for this assertion. The court's order in the case is brief and does not suggest a reason for its disposition of the matter, except that the court believed that the NSPS for modified boilers was "seriously deficient." Lignite Energy Council v. EPA, No. 98-1525 (D.C. Cir. Sept. 21, 1999).

years instead of 4 years. Finally, the project requires a significant capital expenditure of \$12 million, which Detroit Edison states is triple the cost of replacing the worn blades with ones of the same design, and which vastly exceeds prior blade and rotor maintenance costs. A more detailed application of the relevant factors to the information that Detroit Edison has submitted regarding the Dense Pack project follows.

#### Nature and Extent

Detroit Edison seeks to replace the entire high-pressure section of two turbines to allow for use of a new type of turbine blade and to reconfigure the design to improve efficiency. This includes reconfiguration of blades in the high-pressure sections of the two units, including new parts and additional stages. The turbine - in particular the high-pressure section - is an integral and major component of an electric generating facility. Furthermore, the proposed change will be of considerable importance to the operation of the facility because, among other options, it will enable the units to produce more electricity with the same coal usage, boiler heat input and steam flow, and allows operation of the units with less maintenance. In addition, by making operation of the affected units more efficient, the Dense Pack upgrade will provide an economic incentive to increase operations at the plant.

Several other facts that EPA has found telling in past decisions and guidance also indicate that the Dense Pack upgrade would not be routine. First, the project cannot be performed during the full functioning of the plant and instead would require the affected units to be shut down. Second, the project would involve the addition of parts not previously used. Third, the project could not be completed with parts typically stored on site. Finally, Detroit Edison plans to capitalize 100% of the cost of the project.

#### Purpose

Replacement of currently deteriorated blades with blades of the same design would restore only 2% of the efficiency that has been lost as the equipment has aged, leaving the units 5% below their original efficiency rating. The Dense Pack project, however, would increase efficiency of the high-pressure sections of the turbines over current levels by 12%, and overall efficiency of the turbines by 4.5%. The new configuration could reduce efficiency deterioration by 70%.

Thus, the Dense Pack project will not simply maintain the equipment at the current state, but will enhance the operation of the Monroe Power plant by recovering the accumulated lost efficiency, increasing the efficiency over the original design, and decreasing the rate of turbine blade deterioration in the high pressure section. This efficiency enhancement and decrease in deterioration rate would in turn substantially enhance the operational capabilities of the affected units, by providing an economic basis for increased utilization. As discussed below, Detroit Edison claims that it does not intend to use the unit more in the future as a result of the Dense Pack project, but that does not change the fact that the project would enable it to do so.

Frequency

Turbine upgrades like the Dense Pack project are performed rarely, if ever, in the course of a utility source's life. Detroit Edison has not provided any information to suggest that individual facilities in the industry frequently conduct a complete replacement of the high pressure section of a utility steam turbine, relying instead on two claims: (1) that utilities commonly perform turbine maintenance activity; and (2) that it estimates that projects "similar" to the Dense Pack have been performed at a number of utilities. Neither of these claims addresses the central question - whether it is industry practice that a typical facility will frequently conduct the project in question. The only available information -- Detroit Edison's experience -- suggests that projects like the Dense Pack are performed infrequently at individual sources; this project has never been performed previously at Monroe and will greatly increase the time between "overhauls" of the high pressure section.

Cost

Detroit Edison expects the Dense Pack project to cost approximately \$12 million. Detroit Edison has estimated that replacement of the current blades with blades of the same design would cost approximately \$2 million per unit. Generally speaking, a new plant costs approximately \$2,000 per kilowatt. Therefore, a new 750 megawatt unit would cost about \$1.5 billion.

An absolute cost of \$12 million constitutes a significant cost, which tends to make this project non-routine. Detroit Edison argues that the cost of the Dense Pack project is significantly less than the cost of the Port Washington project at issue in the WEPCO case. In WEPCO, the estimated cost of the life extension project was \$87.5 million, at least \$45.6 million of which was capital costs. Clay Memo at 6. EPA acknowledges that this cost is well in excess of the proposed Dense Pack project, especially considering inflation. However, as the Agency noted in 1988, WEPCO's activity was "far from" routine, *id.* at 3, and the facts of that case should be considered in that context. By contrast, EPA has determined that a proposed project costing \$905,000 was non-routine. Letter from Howekamp to Connery at 5. Considering these two precedents, EPA believes that the \$12 million expenditure in this case, all of which is capital in nature, supports a determination that the proposed project is non-routine.

Although the relative cost of the Dense Pack project, when compared with replacing the entire electric generating facility, is small, it is orders of magnitude larger than other blade maintenance activity Detroit Edison has conducted in the past. For instance, it appears that the company spent \$18,700, \$33,100, and \$7,900 to replace high-pressure rotors in three projects in 1981 and 1982. Further, the project is significantly more costly than simply replacing deteriorated blades today; Detroit Edison acknowledges that the Dense Pack upgrade would cost three times more than its alternative blade repair and replacement project.

## V. Emissions Increase

Since the Dense Pack project constitutes a physical change, EPA must consider whether it would result in a significant net emissions increase. Before providing its analysis, once again EPA will review what the regulations require. Thus, the following discussion provides a context for the analysis of the project that follows

### A. Regulatory Requirements

If a physical change or change in the method of operation is not "routine," it still does not trigger PSD unless it results in a significant net emissions increase. This involves comparing recent pre-change, or "baseline", actual emissions to a projection of future actual emissions following the change. A source's pre-change level of actual emissions from a given unit is "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the [date of the change] and which is representative of normal source operation." *Id.* § 52.21(b)(21)(ii). This figure must be compared to the source's post-change emissions; however, because NSR is a preconstruction program, one must project the unit's future emissions. For units that are not "electric utility steam generating units," EPA's rules require that for units that have "not begun normal operations," i.e., units that will undertake a non-excluded physical or operational change, the post-change emissions "shall equal the potential to emit of the unit," which is the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design," but which also accounts for pollution controls and permit restrictions that limit lawful emissions to a level below the maximum physical capacity. *Id.* § 52.21(b)(4).<sup>14</sup> If a particular change would, standing alone, increase actual emissions by more than a "significant" amount, *see id.* § 52.21(b)(23), the change is subject to PSD, unless other activity at the source renders the net emissions effect of the change insignificant when considered together with contemporaneous (generally within the past five years) emissions increases and decreases at the source. *See id.* § 52.21(b)(3) (defining "net emissions increase").

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14. Under current regulations, changes to a unit that are not routine nor subject to one of the other NSR exemptions are considered to be of such significance that pre-change emissions should not be relied on in projecting post-change emissions. For such units, "normal operations" refers to operations after the change, and are deemed not to have begun. The regulations initially presume that such units will operate year-round at full capacity, but a source owner is free to overcome the presumption by agreeing to limit its potential to emit to any level desired through enforceable restrictions on operations or the use of pollution controls. For example, if limiting the potential to emit results in an insignificant change in emissions, the source can avoid PSD applicability. *See* 63 Fed. Reg. 39858 (July 24, 1998) (Notice of Availability); *see also* 45 Fed. Reg. 52676, 52688-89. If business plans later change and the owner desires to relax those restrictions and obtain a PSD permit at that later time, it may do so. *See* 45 FR 52689; 54 FR 27274, 27280.

For electric utility steam generating units, the post-change emission increase calculation is governed by regulations adopted in 1992 (57 Fed. Reg. 32314, July 21, 1992), commonly referred to as the "WEPCO rule." Although the WEPCO rule did not change the regulatory provision that establishes a unit's pre-change emissions, EPA announced that it would view any consecutive two-year period during the preceding five years as presumptively reflective of "normal source operations." See 57 Fed. Reg. at 32324-25. In addition, EPA amended the regulations regarding a utility unit's post-change emissions in two ways. First, the rules allow utilities to project future emissions resulting from a particular change without committing to a permit restriction limiting the unit's potential to emit to a level below its maximum capacity to emit a pollutant,<sup>15</sup> and they provide that emissions increases independent of the physical or operational change may be discounted from the post-change emissions of the unit. A utility making a particular change, instead of accepting permit restrictions on the potential of the changed unit to emit a particular pollutant, may avoid PSD if its projection of "representative actual annual emissions" following the change is not significantly greater than its pre-change emissions, but only if the source "maintains and submits to the Administrator [or relevant state permitting authority] on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase." E.g., 40 C.F.R. § 52.21(b)(21)(v). Second, in evaluating the source's claimed exemption from PSD, the permitting authority must "[c]onsider all relevant information, including, but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act. . . ." Id. § 52.21(b)(33)(i). The permitting authority must discount any increase "that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole." Id. § 52.21(b)(33)(ii). Nevertheless, if an emissions increase could not have occurred "but for the physical or operational change," the increase must be considered to result from the change. See 57 Fed. Reg. at 32327.

Where the end result of an emissions increase analysis for electric utilities is a projection

15. We are aware, as Detroit Edison states in its initial applicability determination request, that EPA Region VII previously has suggested that a utility undertaking a change to a part of the source other than the boiler may not be entitled to take advantage of the provision that allows for a forecast of future emissions without committing to a present limitation on the source's potential to emit. We have reviewed Region VII's discussion of the matter and the applicable regulations, and we conclude that Detroit Edison may use this provision to calculate future emissions from the boilers, even though it is making changes at the turbines. The plain language of the regulation is categorical; irrespective of where a change takes place, the post-change emissions of the electric utility steam generating unit – which certainly includes the boiler – must be determined using the "representative actual annual emissions" approach. See 40 C.F.R. § 52.21(b)(21)(v).

accepted by the permitting authority that emissions would not increase as a consequence of a particular change, the rules call for an initial determination that the change would not be a major modification subject to PSD. See Letter from David P. Howekamp, Air Division, Reg. IX, to Richard K. McQuain, HEI Power Corp., at 1-2 (undated) (describing WEPCO rule as conferring conditional exemption from PSD where projected emissions increase is insignificant). However, if the information that the source must submit for the requisite number of years following the change demonstrates that emissions have in fact increased as a result of the change, the source becomes subject to PSD at that time. See 40 C.F.R. § 52.21(b)(21)(v); 57 Fed. Reg. at 32325 ("If ... the reviewing authority determines that the source's emissions have in fact increased significantly over baseline levels as a result of the change, the source would become subject to PSD requirements at that time.")

#### **B. Analysis of Significant Net Emissions Increase at the Monroe Plant**

Because the Dense Pack project would be a physical change to a major stationary source, Detroit Edison must estimate whether the change would result in a significant net emissions increase to determine whether it must undergo PSD review. 40 C.F.R. § 52.21(b)(2)(i). According to the submission, Detroit Edison asserts that emissions will not increase as a result of the project. As discussed below, EPA accepts for purposes of this determination Detroit Edison's representation that emissions will not increase as a result of the project, and concludes that the Dense Pack upgrade will not trigger PSD, provided that, prior to beginning construction, the company validates its representation by developing and submitting to the permitting agency a calculation of "baseline" actual emissions and a projection of future actual emissions following the project.

Detroit Edison maintains that emissions will not increase as a result of this project because it concludes that one of two consequences will follow the upgrade. First, Detroit Edison claims that because the change would increase efficiency, it would allow increased electricity generation using the same amount of coal, boiler heat input and steam flow while producing the same level of emissions as currently emitted. Alternatively, Detroit Edison claims the project would enable it to generate the same amount of electricity it currently generates using less coal, boiler heat input and steam flow, resulting in reduced emissions. Detroit Edison rejects the third possibility — that it would use the units more, and increase emissions at the plant, as a result of the blade replacement. Detroit Edison states that these units already are at the top of the loading order and had a capacity factor of approximately 85% for 1998. Thus, the company asserts, any increase in use would be the result of demand or unforeseen outages, which could and would have occurred regardless of whether or not Detroit Edison proceeds with the Dense Pack project. The company has not, however, provided any specific projections of future operations and emissions to EPA to support its claims regarding emissions levels.

EPA disagrees that the dispatch position of the Monroe plant necessarily means that the Dense Pack project would not result in increased use, and hence, increased emissions. Given the information provided by the company showing that there is some fluctuation in annual use and

that Units 1 and 4 are not operated at their maximum physical capacity, the fact that Monroe is at the top of the loading order is insufficient to demonstrate that the significant increase in efficiency associated with the Dense Pack project, and the corresponding decrease in the cost of producing electricity, would not result in increased use and emissions. The possibility that Detroit Edison would take advantage of Monroe's increased efficiency to sell additional power in deregulated utility markets beyond its regular service area is an additional reason that the Dense Pack project may well lead to increased emissions. Accordingly, based on the information provided, EPA cannot agree at this time that any future increased emissions at the Monroe plant due to increased use should be attributed to demand growth (as that term is used in the PSD regulations) or other factors not causally related to the Dense Pack project.

EPA notes in this regard that the large size of the Monroe units means that only a small increase in use could result in emissions increases that are significant for PSD purposes. For example, if Detroit Edison decides to run the Monroe plant even 1% more due to the improved efficiency, the resulting increase in emissions would be well above the significance threshold. If a one to five percent increase in operation were to result from the Dense Pack project, increases on the order of 160-800 tons of NO<sub>x</sub> and 400-2000 tons of SO<sub>2</sub> would occur, each of which would be considered "significant," and trigger PSD absent sufficient offsetting contemporaneous emission reductions. See 40 C.F.R. § 52.21(b)(23)(i) (defining 40 tons per year emission increases for sulfur dioxide and nitrogen oxides as "significant").

In determining whether a nonexempt physical or operational change at an electric utility steam generating unit will result in a significant net emissions increase, the applicable PSD regulations at 40 C.F.R. § 52.21(b)(21)(v) and (b)(33) call for a calculation of pre-change "baseline" actual emissions and a projection of future actual emissions for the two year period after the change (or another two year period that is more representative of normal post-change operations). Detroit Edison has not supplied such a projection, perhaps in reliance on its position that the Dense Pack project would be exempted as routine. The company has represented, however, that "the Dense Pack would not result in an increase in the number of hours these units are expected to be operated." EPA has no specific information disputing that assertion, and so is willing to accept Detroit Edison's representation. Nevertheless, until the company provides the calculation and projection called for by the regulations to verify its projection of no increase in actual emissions, our determination is provisional. Detroit Edison should submit these figures to the Michigan Department of Environmental Quality prior to the beginning of construction.

The PSD regulations also require Detroit Edison to maintain and submit to the delegated permitting agency, for a period of 5 years from the date the units resume regular operation following completion of the Dense Pack project, information demonstrating that the project did not result in an emissions increase. To adequately track post-change emissions, EPA expects that this information must include records on annual fuel use, hours of operation, and fuel sulfur content. In making these calculations, Detroit Edison may exclude emissions increases that are caused by other factors, for example, emissions increases that it demonstrates are due to variability in control technology performance or coal characteristics. In addition, when



calculating emission increases, under current regulations Detroit Edison may exclude that portion of its emissions attributable to increased use at the unit due to the growth in electrical demand for the utility system as a whole since the baseline period. See 40 C.F.R. § 52.21(b)(33)(ii).

Finally, EPA notes that regardless of whether PSD review is triggered due to the Dense Pack project, Detroit Edison remains responsible for compliance with all other applicable federal, state, and local air pollution regulations.

## VI. Conclusion

For the reasons delineated above, EPA concludes that the changes proposed by Detroit Edison would not be routine. Detroit Edison's submissions do not demonstrate that projects such as the Dense Pack are frequent, inexpensive, or done for the purpose of maintaining the facility in its present condition. Therefore, the Agency determines that the Dense Pack upgrade would be a "physical change," as that term is used in the NSR regulations. EPA disagrees with Detroit Edison's claims that the Dense Pack project is eligible for the exclusion from PSD permitting for routine maintenance, repair, and replacement. The determination of whether a proposed physical change is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency, cost of the work, as well as other relevant factors. After carefully reviewing all the available information, in light of the relevant factors, EPA has determined that the proposed project would not be "routine."

The PSD regulations (under the provisions commonly known as the "WEPCO rule") allow a source undertaking a nonroutine change that could affect emissions at an electric utility steam generating unit to lawfully avoid the major source permitting process by using the unit's representative actual annual emissions to calculate emissions following the change. Detroit Edison contends that representative actual annual emissions following the Dense Pack project will not be greater than its pre-change actual emissions, because the project will not result in increased use of the units. Therefore, Detroit Edison may avoid major PSD permitting to the extent it documents its pre-change baseline emissions and submits information following the change to confirm its pre-change projection. If Detroit Edison fails to comply with the reporting requirements of the WEPCO rule or if the submitted information indicates that emissions have increased as a consequence of the change, it will be required to obtain a PSD permit for the Dense Pack project.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
	)	
and	)	
	)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE	)	
COUNCIL, and SIERRA CLUB	)	Magistrate Judge R. Steven Whalen
	)	
Plaintiff-Intervenors	)	
	)	
v.	)	
	)	
DTE ENERGY COMPANY, and	)	
DETROIT EDISON COMPANY	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF  
"ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"**

**EXHIBIT 3**



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II  
26 FEDERAL PLAZA  
NEW YORK, NEW YORK 10278

SEP 7 1988

SEP 9 '88

Mobil Oil Corporation/  
Paulsboro Refinery  
Paulsboro, New Jersey 08066

Attention: Mr. Dale E. Choate, Refinery Manager

Dear Mr. Choate:

This memorandum is written in response to your request dated February 26, 1988 concerning EPA's concurrence on the scheduled replacement of the regenerator cyclones in the Fluid Catalytic Cracking Unit (FCC), at the Paulsboro refinery. Additional information concerning this project was submitted to Mr. William J. O'Sullivan, Assistant Director, of the New Jersey Department of Environmental Protection ("NJDEP"), on May 23, 1988.

EPA, Region II, has reviewed this information, together with the information provided in your February 26, 1988 submittal and has determined that the replacement of the regenerator cyclones does constitute routine maintenance. During this turnaround, repairs and replacement of FCC components at the Paulsboro refinery, are not considered modifications under §60.14(e)(1), therefore, this unit is not subject to New Source Performance Standards ("NSPS") for sulfur oxides ("SO<sub>x</sub>").

If you have any further questions, please contact Jose A. Rodriguez at (212)-264-6686.

Sincerely,

  
Kenneth E. King, Chief  
Air Compliance Branch

cc: W. O'Sullivan, Assistant Director  
New Jersey Department of  
Environmental Protection

EPAOEC 043879

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
	)	
and	)	
	)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE	)	
COUNCIL, and SIERRA CLUB	)	Magistrate Judge R. Steven Whalen
	)	
Plaintiff-Intervenors	)	
v.	)	
	)	
DTE ENERGY COMPANY, and	)	
DETROIT EDISON COMPANY	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF  
"ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"**

**EXHIBIT 4**

HUNTON & WILLIAMS

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KNOXVILLE, TENNESSEE 37901  
TELEPHONE 615-637-4311

FILE NO

DIRECT DIAL NO 202 955

June 5, 1989

Ms. Polly Gault  
Chief of Staff to  
the Secretary  
United States Department  
of Energy  
1000 Independence Avenue, S.W.  
Room 7A257  
Washington, D.C. 20585

Dear Polly:

I appreciated the opportunity to meet with you and discuss the so-called WEPCo case and its progeny. Enclosed is a briefing paper which explains the problem and outlines how EPA could easily solve it administratively. As discussed in the enclosure, the consequences of these decisions are far reaching. Among other things,

1. WEPCo will wholly undermine any "acid rain" legislation designed to allow reductions in the most cost-effective way;
2. WEPCo is presently causing utilities to defer needed major maintenance, repair and replacement projects required for maintaining a reliable electric supply;
3. Utilities and others that want to reduce emissions by converting to natural gas are barred from doing so

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HUNTON & WILLIAMS

Ms. Polly Gault  
Department of Energy  
June 5, 1989  
Page 2

without a PSD new source permit  
unless they were capable of burning  
gas in 1975; and

4. If the WEPCo rationale is not  
qualified, utilities face substantial  
risks in undertaking a "clean coal"  
demonstration project.

As I mentioned at our meeting, we have asked  
Administrator Reilly to reconsider the WEPCo  
interpretations. We know that the EPA staff will oppose  
our request. This steadfast refusal to back down is best  
illustrated by a May 5 letter to Detroit Edison where  
Acting Assistant Administrator Don Clay stated:

In your March 13 letter, you provided  
data that illustrated large decreases  
in the source's "potential to emit"  
sulfur dioxide, particulate  
matter . . . and NOx as a result of  
the conversion. [Nevertheless,]  
[o]ur review of the available  
information suggests that Region V's  
conclusion that the source appears to  
be subject to PSD review . . . is  
correct.

We hope the Department and others in the  
Administration will urge Administrator Reilly to overrule  
his staff on this important issue. I am sending Linda  
Stuntz, under separate cover, more detailed information on  
the WEPCo case, including an amici brief supporting  
Wisconsin Electric in the Seventh Circuit litigation. That  
brief, joined in by the aluminum, steel, utility,  
petroleum, and coal industries, underscores the broad and  
adverse impact WEPCo will have on energy policy and on our  
economy.

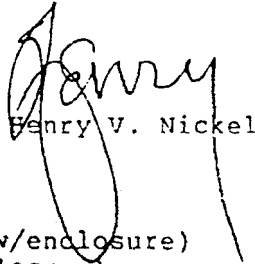
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HUNTON & WILLIAMS

Ms. Polly Gault  
Department of Energy  
June 5, 1989  
Page 3

If I can provide any additional information, please let me know. We would appreciate the opportunity to meet with you and others in the Department within the next few weeks to discuss analyses we are preparing on the impact of WEPCo on the utility industry.

Sincerely yours,



Henry V. Nickel

Enclosure

cc: Linda Stuntz, Esquire (w/enclosure)  
- Mr. Walker Nolan (w/enclosure)  
Ms. Lynn LeMaster (w/enclosure)

UARG1 0000092

June 5, 1989

THE WEPCO, DETROIT EDISON,  
AND OHIO EDISON DECISIONS

In October 1988, Administrator Thomas affirmed a determination of then Acting Assistant Administrator Don Clay finding that new source performance standards (NSPS) (i.e., SO<sub>2</sub> scrubbers) and prevention of significant deterioration (PSD) new source permitting requirements would apply if a maintenance, repair, and replacement project (called a "life extension" project) planned at a five unit coal-fired electric generating plant owned by Wisconsin Electric Power Company (WEPCo) went forward. WEPCo was seeking to replace equipment that posed safety concerns at four of the units and required shutdown of one of those units. In addition, replacement of defective equipment was required at two units to allow those units to operate again at design capacity. The remainder of the repairs and replacements in the project were needed to improve efficiency and reliability without having any impact on emission rates.

On February 15, 1989, Acting Assistant Administrator Clay resolved additional issues posed by WEPCo. Among other things, he determined that WEPCo could not avoid NSPS by switching to a lower sulfur coal, but rather would need to install scrubbers or similar controls. He also found that PSD review would be required even though the units were not increasing their emission rate.

In the Detroit Edison case, EPA Region V determined that a project to allow natural gas-firing at an oil-fired plant could not be undertaken without a PSD permit. In a May 5 letter, Don Clay observed that the project would substantially reduce emissions, but he nevertheless tentatively concluded that Region V's PSD determination appears to be "correct."

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In the Ohio Edison case, EPA determined that removing a clean coal technology demonstration project after the demonstration concluded would trigger PSD and NSPS requirements. Although EPA Acting Assistant Administrator Clay promised "no action" in terms of EPA civil enforcement, "clean coal" participants would still potentially face criminal penalties for "knowing" violations of the Clean Air Act and would be subject to citizen suits under the Act. In other words, EPA has made clear that removing a clean coal demonstration project is unlawful (in EPA's view) and has informed those undertaking these demonstration projects that, at most, EPA will not initiate a civil action. Citizens and a local U.S. Attorney can do what they want.

The Utility Air Regulatory Group<sup>1/</sup> has requested that Administrator Reilly reconsider these decisions. Detroit Edison is separately seeking review of the Region V decision concerning its natural gas project.

EPA's New Interpretation of  
the NSPS and PSD Requirements

New Source Performance Standards (NSPS) require new sources to meet a 70-90% scrubbing requirement and other stringent emission limitations. The Prevention of Significant Deterioration (PSD) permit program imposes numerous monitoring

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<sup>1/</sup> The Utility Air Regulatory Group (UARG) is a voluntary, nonprofit, unincorporated, ad hoc group of 65 electric utilities, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. UARG's purpose is to participate on behalf of its members collectively in federal air pollution control regulatory activities and in related litigation. Since 1977, UARG has been involved in all major Environmental Protection Agency Clean Air Act rulemaking and in numerous judicial proceedings related to these rulemakings.

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and modeling requirements on new sources, as well as technology-based emission limits that are potentially more stringent than NSPS. Existing sources are subject to NSPS and PSD if they are "modified," that is, if they undergo physical or operational changes that increase emissions.

The WEPCo, Detroit Edison, and Ohio Edison decisions substantially expand the previous understanding of what is a "modified" source for NSPS purposes. Under these decisions, if emissions immediately before a "non-routine" (as determined by EPA staff) change are greater than emissions after the change, NSPS is triggered. This is the case notwithstanding the fact that the emissions immediately before the change are not representative of normal source operations.

EPA similarly expanded the "modification" requirements that apply to the PSD program. Under these decisions, if EPA finds a change to be "non-routine," EPA will always conclude that the change causes an emissions increase since EPA compares actual annual emissions before the change with the emissions projected from operating 100 percent of the time, at 100 percent capacity, for 365 days. This approach, which allows projects an emission increase, conflicts with the plain language of EPA's rules.

EPA's decisions acknowledge that "routine" repairs and replacements are not subject to the NSPS and PSD modification rules. However, the Agency has arbitrarily redefined what repair and replacement activities are "routine," such that "routine" activities include only those that (1) are frequently done at that plant, (2) involve no major equipment, (3) are inexpensive, and (4) do not extend the life of a plant. This new interpretation is vastly different from past implementation of the "routine" rule, which included any repair and replacement activity that is normal business practice. It gives EPA staff

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virtually unlimited discretion to find that any major repair or replacement project is "non-routine."

Direct Impacts of the WEPCo,  
Detroit Edison, and Ohio Edison Decisions

Under these decisions:

1. A unit that discovers safety problems due to an unanticipated defect in equipment and shuts down pending repairs cannot resume operations without meeting stringent new source standards and receiving a new source prevention of significant deterioration ("PSD") permit. This occurs whenever EPA determines the repair or replacement is not "routine." WEPCo, Port Washington Unit 5, October 14 letter.
2. A unit, under the WEPCo decision, cannot repair or replace deteriorated or defective equipment needed to return to past maximum operating levels, unless the repairs or replacements are "routine." WEPCo.
3. A unit cannot avoid an emissions increase that would trigger new source standards by switching to a lower sulfur coal or oil, or to natural gas. It must install control technology (e.g., scrubbers). WEPCo, February 15 letter.
4. A utility experiencing increased forced outages at its units due to equipment problems cannot undertake repairs needed to avoid serious electric reliability problems without applying for and receiving a PSD permit, even though these repairs will only improve reliability and efficiency and will not increase the emission rate of the

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units. This occurs whenever EPA determines these "emissions neutral" or even "emissions beneficial" repairs or replacements are not "routine." WEPCo, Detroit Edison.

5. A unit that was not able to burn a lower polluting fuel (e.g., natural gas) in the past cannot be converted to burn that fuel without first applying for and receiving a PSD permit. Detroit Edison.
6. A unit that has undertaken a "clean coal" demonstration project must meet new source standards and obtain a PSD permit if it wishes to remove the experimental technology at the end of the demonstration period. EPA may issue a "no action" assurance to such a project. Ohio Edison. A "no action" assurance is a promise by the EPA signatory (in the case of Ohio Edison, an Acting Assistant Administrator) that EPA will not bring a civil enforcement action. This does not insulate the company from a "citizen suit" under the Clean Air Act. Also, as the attachment to the EPA Ohio Edison letter makes clear, a U.S. Attorney can still bring a criminal prosecution.

Broader Consequences of the WEPCo,  
Detroit Edison, and Ohio Edison Decisions

1. WEPCo will wholly undermine any "acid rain" legislation designed to allow reductions in the most cost-effective way. For example, it subjects many older, smaller units to scrubbers when these units are the logical candidates for fuel switching.
2. WEPCo is presently causing utilities to defer needed major maintenance, repair and replacement projects

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required for electric system reliability. The consequence of such deferrals is that utilities must risk interruption of service in the very near future or costly expenditures on short-term solutions (e.g., unplanned installation of combustion turbines). Given the time required to obtain a PSD permit to undertake a repair program at an existing unit or to install a new combustion turbine, a substantial deterioration in electric reliability in the near future -- with serious health and environmental consequences -- is likely unless WEPCo is revisited.

3. For other industries, WEPCo says: you may not undertake major repairs or replacements that restore a plant to its past levels of production unless someone in an EPA region or EPA headquarters finds that the project is "routine." Given EPA's restrictive interpretation of "routine," the WEPCo decision means that such projects cannot be undertaken without assuming substantial risks or seeking a determination from EPA that could take 6 to 12 months.
4. Even more troublesome is the WEPCo determination that major repairs and replacements that improve "reliability" and "efficiency" but do not increase (and may even reduce) emission rates can require a PSD permit unless EPA determines that the project is "routine." This aspect of the WEPCo decision is hostile to improving the productivity of our basic industries.
5. Utilities and others that want to reduce emissions by converting to natural gas are barred from doing so without a PSD permit unless they were capable of burning gas in 1975. This will cause companies to abandon such conversions in many cases and delay them (due to PSD

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permitting requirements) whenever a company decides to proceed.

6. If the WEPCo rationale is not qualified, utilities face substantial risks undertaking a "clean coal" demonstration project. If new source requirements apply upon removal of the experimental controls, a unit will have to be shut down or face very costly retrofit controls. The price may be too great for many companies, thereby discouraging participation in the program.

Administrative Solution to the WEPCo,  
Detroit Edison, and Ohio Edison Cases

In the WEPCo, Detroit Edison, and Ohio Edison decisions, EPA interpreted its new source performance standards (NSPS) and prevention of significant deterioration (PSD) requirements in an unprecedented manner. While the rules governing these EPA programs are complex, the EPA determinations in these cases could be easily overcome with the following interpretations:

1. For NSPS purposes, EPA can, and should, recognize that, in determining an emissions increase, representative operations of the unit should be used in comparing past emissions to future emissions after a change. Nothing on the face of EPA's regulations or their regulatory history precludes such a declaration by the new EPA Administrator. Such a "clarification" would mean that "clean coal" technologies could be removed at the end of the demonstration period without triggering NSPS. It would also allow utilities and other industries to make necessary repairs to return plants to past maximum production levels.

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2. For PSD purposes, EPA can, and should, recognize that any emission increase predicted to occur as a result of an increase in hours of operation or production rate up to original design capacity (unless limited by a federally enforceable restriction on production or hours) is an exempt emission increase, as § 52.21(b)(2)(iii)(f) of EPA's rules explicitly and unambiguously provides. This reconsideration of the WEPCo, Detroit Edison, and Ohio Edison decisions would allow "clean coal" projects to proceed without having to receive a PSD permit. It would also allow industry to convert to lower-emitting natural gas without a PSD permit.

UARG1 0000100

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
	)	
and	)	
	)	Judge Bernard A. Friedman
NATURAL RESOURCES DEFENSE	)	
COUNCIL, and SIERRA CLUB	)	Magistrate Judge R. Steven Whalen
	)	
Plaintiff-Intervenors	)	
	)	
v.	)	
	)	
DTE ENERGY COMPANY, and	)	
DETROIT EDISON COMPANY	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION  
TO ESTABLISH CORRECT LEGAL STANDARD ON THE ISSUE OF  
"ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT"**

**EXHIBIT 5**



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN INDIANA GAS  
AND ELECTRIC COMPANY ,  
Defendant.

IP 99-1692-C-M/F

**ORDER ON SOUTHERN INDIANA GAS AND ELECTRIC COMPANY'S  
MOTION FOR SUMMARY JUDGMENT ON FAIR NOTICE**

90-5-2-1-06966

**ORDER ON SOUTHERN INDIANA GAS AND ELECTRIC COMPANY'S  
MOTION FOR SUMMARY JUDGMENT ON FAIR NOTICE**

This matter is before the Court on defendant Southern Indiana Gas and Electric Company's ("SIGECO") Motion for Summary Judgment on Fair Notice on the United States' ("the Government") claims that it violated the Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq.* The parties have fully briefed their arguments, and the motion is now ripe for ruling.

**I. BACKGROUND**

**A. RELEVANT PROVISIONS OF THE CLEAN AIR ACT**

This motion does not require the Court to determine if SIGECO's projects actually violated the CAA. The Court need only determine whether SIGECO had fair notice of the Government's interpretation of the routine maintenance exemption. However, some discussion of the CAA provisions at issue in this case is necessary before turning to the substance of the motion.

The purpose of the CAA is "to protect and enhance the quality of Nation's air resources so as to promote the public health and welfare and productive capacity of its population." 42 U.S.C. § 7401 (b) (1994). To accomplish this purpose, Congress required the Administrator of the Environmental Protection Agency (the "EPA") to identify and prepare air quality criteria for air pollutants, and promulgate national primary and secondary ambient air quality standards ("NAAQS") for each pollutant. *Id.* § 7408-09. States were then required to classify areas where the air quality was better or worse than the NAAQS for each pollutant. An area that meets the NAAQS for a particular pollutant is designated an "attainment" area, while areas that do not meet the NAAQS are called "non-attainment" areas. *Id.* § 7407(d). An area that cannot be classified due to insufficient

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The Court holds that SIGECO had fair notice of the EPA's interpretation of routine maintenance prior to all of its projects.

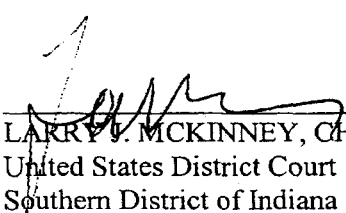
### **Summary**

SIGECO's most compelling evidence that it was not on notice of the EPA's interpretation of the routine maintenance exemption was the inter-agency confusion illustrated by IDEM's non-applicability determination on the 1997 project. However, SIGECO already had completed its 1997 project by the time it received the determination from IDEM, and the notice that matters for the fair notice doctrine are the statements the defendant receives before the alleged violation begins. Accordingly, SIGECO's arguments that the IDEM determination deprived it of notice of the EPA's interpretation of routine maintenance lose force. The Clay Memo and WEPCO's discussion of routine maintenance made it "ascertainably certain" that the EPA would make a case-by-case determination by weighing the nature, extent, purpose, frequency, cost, and other relevant factors, to make a common-sense finding. Further, it also was "ascertainably certain" that no factor would be elevated above the rest and given dispositive weight, and that how often a project occurred in the life of a unit was a significant factor. The 1989 UARG letter confirms that the regulated community understood how the EPA interpreted routine maintenance in the Clay Memo. Therefore, the Court **DENIES** SIGECO's Motion for Summary Judgment on Fair Notice.

**IV. CONCLUSION**

For the reasons discussed herein, the Court finds that SIGECO had fair notice of the EPA's interpretation of routine maintenance. Thus, the Court **DENIES** SIGECO's Motion for Summary Judgment.

IT IS SO ORDERED this 13 day of February, 2003.

  
LARRY V. MCKINNEY, CHIEF JUDGE  
United States District Court  
Southern District of Indiana

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#### **APPENDIX: EVIDENTIARY ISSUES**

At issue in this motion is whether or not SIGECO had fair notice of the EPA's interpretation of the routine maintenance exemption. As stated earlier, that notice can come from the routine maintenance exemption itself, or from public statements by the EPA about the exemption. Many of the documents offered by SIGECO (1) are not public statements by the EPA, or (2) do not construe the routine maintenance exemption. Documents from either category are not relevant to the fair notice inquiry and will not be considered by the Court. The Government also makes a number of other objections to evidence relied upon by SIGECO, and offers evidence to which SIGECO objects. The objections will be ruled upon in turn.

#### **A. EVIDENCE OFFERED BY SIGECO NOT RELEVANT TO FAIR NOTICE INQUIRY**

The Court's review and analysis of the relevant case law has convinced it that the following pieces of evidence offered by SIGECO are not relevant to the fair notice inquiry: various EPA background documents on the NSR program; the 1978 letter from the EPA's Director of the Stationary Source Enforcement Division to the Director of EPA's Region VI Enforcement Division (Def.'s Ex. 6); IDEM's 1986 non-applicability determination; IDEM's 1989 non-applicability determination; a number of other EPA non-applicability determinations that SIGECO finds compelling; and the deposition testimony from former EPA officials.

The background documents and the 1978 letter are not relevant to the fair notice analysis. Most importantly, no evidence has been offered to show that the documents were *public* documents that notified the regulated community of the EPA's *official* position. The 1978 letter was an internal memo from one EPA official to another, and the background documents are unofficial statements

that do not even mention the routine maintenance exemption. SIGECO has offered no evidence that it was aware of these documents prior to this lawsuit (or, more importantly, prior to its projects in 1991, 1992 or 1997). Moreover, as the Fourth Circuit emphasized in *Hoechst Celanese*, the fair warning inquiry centers on the perspective of the defendant, not the agency. See *Hoechst Celanese*, 128 F.3d at 226 (“But in addressing whether a party has received fair notice, we look at the facts as they appear to the party entitled to notice, not the agency.”). SIGECO has not drawn the Court’s attention to any cases that consider internal, unofficial statements by an agency about its regulations, and the Court’s own research has uncovered no such cases. Instead, the fair warning case law focuses on the language of the regulation itself, and public statements made by the agency about its interpretation of the regulation. Consideration of these internal documents would unduly expand the boundaries of the fair warning rule and re-direct the focus of the analysis from the defendant to the agency. Therefore, the documents are excluded.

In 1986, SIGECO contacted IDEM about a project at Culley Station Unit 2 that involved replacing the forced draft system with a balanced draft system. IDEM concluded that the project was not required to obtain a construction permit, which it would have needed if it was subject to NSR. The project cost approximately \$8 million and required a six-month outage to be completed. IDEM issued SIGECO a similar non-applicability determination for another balanced draft conversion project in 1989 at Culley Unit 3 – a project that cost over \$16 million. SIGECO argues:

[T]hese projects [the 1986 and 1989 projects] included far more extensive tube replacement than any of the projects at issue in this case. IDEM’s determinations are critical to this case because they confirm to SIGECO that repair and replacement projects of this magnitude did not trigger New Source Review. Obviously, when SIGECO undertook later maintenance, repair, and replacement activities that were far less significant than these larger projects, including the Projects at issue in this case, it had absolutely no reason to believe that these later projects triggered New

Source Review.

Def.'s Memo in Support of Motion for Summary Judgment on Fair Notice at 32.

SIGECO's arguments about the 1986 and 1989 projects are unavailing. Although SIGECO's 1986 "Life Extension Program" cost \$8 million and required a six-month outage to complete, SIGECO had no information from IDEM that the routine maintenance exemption played any role in its determination. IDEM sent SIGECO a brief non-applicability letter that stated: "[t]he modifications and replacements . . . listed in your letter as part of a Life Extension Program on Unit 2 will not require a construction permit from the Department of Environmental Management." Def.'s Ex. 33. No mention of routine maintenance was made in the letter. NSR construction permits are not required for projects that do not increase emissions, and Hurst admitted that during SIGECO's discussions with IDEM about the 1986 project, SIGECO represented to IDEM that the project would have no effect on emissions. Pl.'s Ex. 26, Hurst Depo. at 55. Due to this representation about emissions, and due to the fact that the project would require Unit 2 to be shut down for six months, it seems unlikely that SIGECO could have reasonably taken the non-applicability determination as a statement about the scope of routine maintenance. It would have been a very speculative and risky assumption to make, considering that the letter that did not even mention the exemption. The Court concludes that this determination has no bearing on whether or not SIGECO had fair notice about the EPA's interpretation of routine maintenance.

SIGECO also compares the projects at issue to a 1989 project at Culley Station Unit 3. The estimated cost of the 1989 project was \$16.5 million. Def.'s Stmt. of Facts ¶ 34. Yet IDEM's non-applicability letter for the 1989 project explicitly cites lack of emissions as the reason it would not require a permit. Def.'s Ex. 34. In the June 1989 letter, IDEM stated, "[n]one of the boiler or



turbine generator work [involved in the 1989 project] will affect or change emissions from this boiler so they do not require any permitting action. The effect of the ESP modification will be to decrease emissions.” *Id.* As with the 1986 project, no mention was made of the routine maintenance exemption by IDEM. Consequently, this non-applicability determination cannot be considered a public statement by EPA about the routine maintenance exemption. *See Gen. Elec.*, 53 F.3d at 1329.

SIGECO’s attempts to compare its projects to other utility companies’ projects suffer from similar deficiencies. The massive project in Illinois by Com Ed in 1997<sup>1</sup> was allowed to proceed by the state permitting agency subject to the explicit condition that it would not increase emissions. Def.’s Ex. 38.<sup>2</sup> Com Ed argued to the Illinois EPA prior to the determination that NSR would not be triggered because emissions would not increase, and also because it constituted routine maintenance. While the Illinois EPA explicitly cited a lack of emissions increase as a reason for its determination, it did not refer to routine maintenance as a basis for the non-applicability

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<sup>1</sup>Obviously, even if this project was exempt as routine maintenance, it would have no bearing on the 1991 and 1992 projects because the determination was in 1997.

<sup>2</sup>SIGECO offers testimony from the deposition of Shashikant Shah (“Shah”), an Illinois EPA permit reviewer involved in the 1997 Com Ed project non-applicability determination, to show that the basis for the non-applicability determination was that the project was routine. Although Shah does state that the Illinois EPA considered some of the work to be routine, he said that part of the reason it was routine maintenance was that the project would not increase emissions. Def.’s Ex. 40. This appears to be a misunderstanding of the routine maintenance exemption because whether or not emissions increase has no bearing on whether a project constitutes routine maintenance. If emissions will not increase due to proposed construction, that alone suffices to exempt a project from NSPS and PSD. The routine maintenance inquiry is a separate issue that also can, standing alone, exempt a project from NSPS or PSD requirements. In any event, the focus of the fair notice inquiry is on *public statements* made by the agency. Thus, a statement by a permit reviewer in 2002 purporting to explain why the Illinois EPA decided NSPS and PSD did not apply to a 1997 project that was not included in the Illinois EPA’s letter to Com Ed in 1997 has little relevance to the fair notice inquiry.

determination.<sup>3</sup> Nor has SIGECO offered evidence that the EPA's non-applicability determination for the project at Cincinnati Gas and Electric's Beckjord Station involved the routine maintenance exemption. Def.'s Ex. 29. Accordingly, none of these determinations are public statements by the EPA about its interpretation of the routine maintenance exemption. *See Gen. Elec.*, 53 F.3d at 1329.

SIGECO also filed a Supplemental Statement of Material Facts and Evidentiary Material ("Supplemental Statement") in Support of this Motion for Summary Judgment on Fair Notice. This Supplemental Statement consists of deposition testimony from numerous environmental officials, including former EPA officials, current EPA officials, and state environmental officials. The Court allowed SIGECO to file the Supplemental Statement because it appeared that the testimony could assist the Court in deciding the instant motion. However, a closer review of the substance of the deposition testimony has convinced the Court that the testimony is not relevant to the fair notice inquiry.

Because most of the deponent's statements are similar, a few quotations will suffice to illustrate the substance of their testimony. Richard Mays, who held several different positions at the EPA in the 1980s, testified: "there was no discussion, to my recollection, of any enforcement action or any violations being based upon the repair and maintenance rule at the time I was there." Mays Depo. at 52. Mays also stated that he attended periodic docket reviews in which pending enforcement matters were discussed, and "whether the repair and maintenance of an existing piece of – part of a plant would have triggered the NSR, NSPS requirements was never discussed during

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<sup>3</sup>The 1999 Detroit Edison non-applicability determination was also based on the company's assertion that emissions would not increase due to the construction activity. Regardless, that determination has little relevance because it took place after all of SIGECO's projects in the instant case.

these docket reviews.” *Id.* at 126-28. Joseph Cannon, another highly-placed EPA official in the 1980s, also testified that this “new” view of routine maintenance (and more generally, the “new” view of the applicability of NSR to existing sources in the utility industry) was not discussed while he was at the EPA: “the dog didn’t bark . . . even when we were scratching our heads and trying to figure out ways that you could get emission reductions from major sources, including particularly power plants.” Cannon Depo. at 72-73. Cannon continued, “If that had been the position or the policy of the agency I would have known if at that time and it would have been widely discussed.” *Id.* at 78, 82. Other former EPA officials testified that the “focus of NSR programs was to regulate emissions from new plants, not existing plants,” Schweers Depo. at 104, and that they are surprised by the current enforcement initiative. *See, e.g.,* Barber Depo. at 171. Other former officials provided similar observations.

According to SIGECO, the testimony of these individuals “confirms that EPA’s current interpretation of the Clean Air Act’s New Source Review regulations radically departs from EPA’s historical interpretation and establishes beyond doubt that EPA failed to make the rules ‘ascertainably certain’ as required by the fair notice doctrine.” *See* Def.’s Motion for Leave to File Supplemental Statement at 1. However, these depositions only establish that the routine maintenance exemption was not talked about very much while these individuals were at the EPA, or at least that these former officials do not remember the exemption being talked about very much. The Court fails to see how this testimony has anything to do with whether the defendant in this case had fair notice of the EPA’s interpretation of the routine maintenance exemption. An agency has fairly notified a regulated party of its interpretation of a regulation, “[i]f, by reviewing the regulations and other *public* statements issued by the agency, a regulated party acting in good faith would be able

to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *Gen. Elec. Co.*, 53 F.3d at 1329 (citations omitted) (emphasis added). The deposition testimony does not come from any *public* statements by the EPA about how to interpret routine maintenance or the NSR programs; rather, it arises from the distant memory of former EPA officials and establishes a lack of *internal* discussions about these issues. Confusion within an agency about how to interpret a provision does suggest that a defendant may not be fairly notified, *see Gen. Elec. Co.*, 53 F.3d at 1332, but none of this testimony establishes confusion at EPA about this exemption – the officials merely opine that there was no discussion about it. Accordingly, the Court will not consider the deposition testimony offered in SIGECO's Supplemental Statement of Material Facts.

## **B. REMAINING EVIDENTIARY ISSUES**

### **1. Statement from EPA Contractor**

SIGECO submits a statement made in 1986 by an EPA contractor listing a number of common repair/replacement jobs for a boiler. Def.'s Ex. 9. The contractor contacted seven companies by telephone for reports of projects at their facilities, and produced a survey based on those calls. The Court excludes this statement as hearsay because it is being offered for its truth. Even if it were not hearsay, it has scant relevance to the fair notice inquiry. The survey says nothing at all about the routine maintenance exemption. Nor would an outside contractor be able to speak for the EPA on what constitutes routine maintenance. Moreover, courts only consider the language of the regulations at issue and any public statements by the agency about the regulations when analyzing fair notice, and SIGECO offers no evidence that this was a public statement that may have given it notice of the EPA's interpretation of routine maintenance. *See Gen. Elec.* 53 F.3d at 1329

(company is fairly notified if agency's interpretation of its regulations is ascertainably certain from regulation itself or *public statements* by the agency). Accordingly, the Court excludes the letter from the contractor<sup>4</sup>. Def.'s Ex. 9.

## **2. 1990 Report by EPA Consultant**

SIGECO also offers a 1990 report prepared by an EPA consultant analyzing the issue of utility "life extension" practices. Pl.'s Stmt. of Facts ¶ 17. The Government objects to this report as hearsay, and SIGECO argues that (1) the report is not hearsay because it is a party-opponent admission under 801(d)(2), and (2) it is a public record under 803(8), and consequently admissible even if it is hearsay.

Though SIGECO does not specify which type of admission this report is under FED.R.EVID. 802(d)(2), the only category that it could arguably fit under is the "agency admission" exemption in 802(d)(2)(D), which exempts "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The language of the rule requires that the author of the statement be an agent or servant of the party it is being offered against, and it appears that this report, Def.'s Ex. 17, was prepared by an outside, independent contractor. Under rudimentary agency law, an independent contractor is not an agent or employee of the principal, and SIGECO has provided the Court with no evidence that the company that prepared the report was anything other than an independent contractor. *See*

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<sup>4</sup>SIGECO also submits a 1991 report from another EPA contractor about life extension projects. *See* SIGECO Supp. Brief in Support of its Motion for Summary Judgment on Fair Notice. The 1991 report is inadmissible hearsay. Even if it were not hearsay, the Court agrees with the Government that this *internal* memo written by an *outside contractor* has no relevance to the fair notice issue. *See General Electric*, 53 F.3d 1324.

CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE PRACTICE UNDER THE RULES § 8.32 at 1128 (2d ed. 1999) [hereinafter MUELLER & KIRKPATRICK] (“[P]robably the framers [of the Federal Rules of Evidence] meant to exclude most statements by most independent contractors.”). The Court concludes that the report is not an admission.

SIGECO also claims that the report is not hearsay because it is within the ambit of the public records exception. However, the exception requires that a report be authored by a “public office or agency,” and this report was compiled by a private company. FED.R.EVID. 803(8); *see also* MUELLER & KIRKPATRICK, § 8.50 at 1231 (“By its terms, the public records exception does not embrace records prepared by private entities or people who are not public officials, even when filed with public agencies as required.”). Private reports like this one do not have the indicia of reliability that justify the public records exception to the hearsay rule. Because the report is being offered for its truth, and because it is not an admission or a public record, it is excluded.

### **3. Department of Energy Report**

SIGECO quotes from a Department of Energy (“DOE”) report on life extension projects that describes certain specific projects in the utility industry and makes some observations about NSPS. Def.’s Ex. 18. The Government objects to the document as hearsay, and SIGECO claims that it is admissible because (1) it is an admission, and (2) it is a public record.

The Court need not address whether the report is an admission because it is admissible under the public records exception to the hearsay rule. FED.R.EVID. 803 provides in relevant part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . .

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) . . . factual findings resulting from an investigation made pursuant by authority granted by law.

The DOE is a public office or agency, and the preface of the report, Def.'s Ex. 18 at SIG 342408, explains that the DOE is required by law to provide this kind of analysis. Although there are some observations and conclusions in the report, most of the report is factual in nature. Courts have had difficulty separating facts from conclusions when making evidentiary determinations under this exception, but the Supreme Court settled this issue in *Beech Aircraft Corp. v. Rainey* by broadly construing the exception and admitting the conclusions if they had sufficient indicia of reliability. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439 (1988) (in view of difficulty of distinguishing facts from conclusions, concern over applying public records exception should be answered by examining trustworthiness). This report was prepared by the Energy Information Administration ("EIA"), an independent statistical branch of the DOE, and the special skill, experience, and independence of the EIA furnish sufficient indicia of reliability and trustworthiness to admit this report under the public records exception. *See* Advisory Committee Notes to FED.R.EVID. 803(8) (the special skill and experience of the official is a factor that assists courts in passing on the admissibility of evaluative reports). This seems to be the type of report the public records and reports exemption was designed to exempt from the hearsay rule, and the Court concludes that it is admissible.

#### **4. General Accounting Office Report**

The Government makes a hearsay objection to SIGECO's use of a statement made in a General Accounting Office ("GAO") report. Def.'s Ex. 20. The report is entitled: "Electricity

Supply: Older Plants' Impact on Reliability and Air Quality." *Id.* In the relevant language of the report, GAO paraphrases what it had been told by EPA policy officials<sup>5</sup> about the impact of the WEPCO decision. SIGECO claims that the GAO is part of the United States government, and that the statement should consequently be considered an admission in this case, and also that the report is a public record.

The Court admits the GAO under the public records exception to the hearsay rule. Fed.R.Evid. 803(8). First, the GAO – the nonpartisan, investigative arm of Congress – is a public agency. Second, the GAO is charged with the duty to prepare investigative reports for Congress, and this report was completed as a result of a request by Senator Dingell, then Chairman of the Subcommittee on Oversight and Investigation for the Committee on Energy and Commerce. Moreover, the GAO has skill and experience in studying and evaluating the nation's environmental needs and goals, and the Government has not offered any evidence that would undermine the trustworthiness of the report. Accordingly, the GAO report is admitted.

### **5. Industry Letters**

The Government relies on three industry letters sent to the EPA asking the agency to reconsider its interpretation of routine maintenance. Pl.'s Ex 21, 23, 73. SIGECO contends that the letters are hearsay, and that they are also irrelevant. The Government claims that the letters are only offered to show that industry had knowledge of the EPA's interpretation of routine maintenance.

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<sup>5</sup>The particular quotation that SIGECO uses from this report has two layers of admissibility because the report paraphrases a statement made by an EPA official. First, the statement itself is admissible as a party-opponent admission because it was made by EPA. FED.R.EVID. 801(d)(2). Second, the report is admissible because the Court ultimately concludes that it is a public record.



After reviewing the letters and considering that for which they are being offered, the Court agrees with the Government and will consider the documents.

The 1989 industry letter claimed that the EPA had arbitrarily redefined routine maintenance. Pl.'s Ex. 73. The January 1990 letter focuses on the policy implications of the EPA's WEPCO decision, and a few other decisions involving NSR. Pl.'s Ex. 21. The February 1990 letter<sup>6</sup>, sent subsequent to the Seventh Circuit's issuance of the WEPCO decision, contains industry's legal analysis of the WEPCO decision and its recommendations for EPA action. Pl.'s Ex. 23. The Government offers them to show that the utility industry had notice of how the EPA interpreted routine maintenance as early as 1989. It does not actually matter if the analysis in these letters is true or correct – in fact, the Government would probably dispute much of the substance of the letters. As the Government asserts, the relevance of the letters comes from SIGECO's knowledge or notice of the interpretation of routine maintenance expressed in the letters. Thus, the industry letters are not hearsay because they are not offered for their truth.

#### **6. WEPCO's Seventh Circuit Brief**

The Government also offers excerpts from the brief filed by Wisconsin Electric Company on its appeal to the Seventh Circuit in WEPCO. The Government offers this document to show that the Seventh Circuit already considered and rejected the arguments that SIGECO is making in this case. SIGECO objects to Wisconsin Electric's brief as hearsay and irrelevant. The Court agrees

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<sup>6</sup>The Court has insufficient information to know if SIGECO was one of the sixty-five utility companies who authored the February 1990 letter. SIGECO expressly disavows the January 1990 letter because it was not one of the companies that authored the letter, but it does not make the same claim about the February 1990 letter. If SIGECO was one of the utilities that wrote the February 1990 letter, then the letter is clearly non-hearsay as a party-opponent admission.

with SIGECO and will not consider the brief. Even if it is not offered for its truth, the brief is not sufficiently relevant to the resolution of the current motion to be admissible. The Government offers the document to provide context for the Seventh Circuit's ruling, and to show that "the Seventh Circuit [has] already considered and rejected the interpretation that SIGECO is expected to make in this case." United States' Memo in Support at 12.

The brief does, as the Government maintains, have some limited probative value, but that value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. *See* FED.R.EVID. 403. In WEPCO, the Seventh Circuit concluded that the EPA's consideration of the cost, nature, extent, and frequency of the repairs to determine the applicability of the routine maintenance exemption was not arbitrary or capricious. This does mean, however, that the Seventh Circuit made a wholesale rejection of every argument that Wisconsin Electric made in its brief, or every argument that Wisconsin Electric made to the EPA in its 1988 Memo. Parties often make numerous arguments in motions and briefs, and this Court considers it unwise to assume that the Seventh Circuit's silence on an issue or subissue means that the argument was rejected. Moreover, SIGECO was not a party to those memos, and is not bound by the arguments Wisconsin Electric did or did not make in prior litigation, unless of course the Seventh Circuit explicitly or implicitly rejected an identical argument in the text of its opinion. The Court also has an alternative source of proof to show which arguments the Seventh Circuit rejected in WEPCO that avoids this danger of prejudice to SIGECO: the WEPCO decision itself. *See* FED.R.EVID. 403, ACN ("The availability of other means of proof may also be an appropriate factor."). Accordingly, the Court excludes WEPCO's Seventh Circuit brief under Rule 403 of the Federal Rules of Evidence.

**7. Letter from Commonwealth Edison to Illinois EPA**

SIGECO compares its projects to a number of other projects undertaken in the utility industry. One of those projects was a 1997 project by Commonwealth Edison ("Com Ed") in Illinois. To establish the substance of the project at Com Ed, SIGECO offers a letter Com Ed wrote to the Illinois EPA about the project. The Government objects to this letter as hearsay, and SIGECO responds the letter is not hearsay because it is not offered for its truth, and even if it is, it is admissible under 803(6) as a business record and 803(8) as a public record.

The Court agrees with SIGECO that the letter need not be offered for its truth to be relevant in this case. Com Ed sent this letter describing its project to the Illinois EPA in an ultimately successful attempt to receive a non-applicability determination. The relevance of the letter in this case is how Com Ed characterized the project to SIGECO – specifically how Com Ed described the nature, extent, purpose and cost of the work. It does not matter if this was an accurate description or if the actual project proceeded according to these specifications. This letter was a basis for the EPA's non-applicability determination, and the Court will consider the letter for this limited purpose.

**8. Indiana Department of Environmental Management's**  
**1997 Non-Applicability Determination**

In January 1998, the Indiana Department of Environmental Management ("IDEM") informed SIGECO that neither NSPS nor PSD would apply to its 1997 Unit 3 project. In this motion and other pending motions, the Government attacks how IDEM arrived at this non-applicability decision, and also accuses SIGECO's lawyers of misrepresenting the holding of the WEPCO case in a letter that SIGECO sent to IDEM prior to its determination. On the first issue, IDEM's internal review of

SIGECO's 1997 project is irrelevant to the Court's resolution of this motion. As stated earlier, the focus of the fair notice inquiry is on the notice that the defendant had as a result of an agency's public statements (in addition to the notice provided by the regulation itself), not how the agency arrived at its decision. Regardless of how IDEM reached the decision, the end result was a non-applicability determination and this was the actual notice that SIGECO received, and the Court will not consider any evidence of IDEM's internal review process for purposes of this motion.

SIGECO initially sent a letter to IDEM that briefly described the project, and requested a non-applicability determination. The Government maintains that SIGECO's lawyers misrepresented the holding of WEPCO in that letter, and argues that these misrepresentations tainted the subsequent non-applicability determination because IDEM relied on them. The letter states in part, "The WEPCO court determined that 'like-kind replacements' constitute 'routine maintenance, repair, and replacement' and clearly SIGECO's proposed changes constitute 'like-kind' replacements." Pl.'s Ex. 20. SIGECO then quoted from an EPA letter about the scope and meaning of "like-kind," and argued that its 1997 repairs were covered by that definition. *See id.* The Court agrees with the Government that this is a misstatement of the holding in WEPCO – in fact, the Seventh Circuit considered the WEPCO project to be a "like-kind" project, and still affirmed the Clay Memo's conclusion that the project was not routine maintenance. Although the parties acrimoniously contest the meaning of WEPCO in the instant case, nowhere in briefs to this Court does SIGECO contend that the WEPCO court held that like-kind replacements constituted routine maintenance. However, the letter to IDEM was clearly not an objective memo analyzing the 1997 project and the import of relevant case law. Instead, it contained subjective legal arguments made by an interested party, and was sent to IDEM in an effort to persuade it that PSD and NSPS would not apply to the project. It

was IDEM's responsibility to investigate the project, and make the applicability determination on its own, which would surely include a legal analysis of the WEPCO decision. WEPCO was a landmark CAA case in the Seventh Circuit and IDEM's lawyers were undoubtedly familiar with it long before SIGECO described it in that letter. Regardless of any inadequacies in IDEM's internal review process or how SIGECO described the WEPCO case to IDEM, IDEM ultimately sent SIGECO a non-applicability determination, and the notice contained in that letter is what the Court finds relevant for this motion. Thus, the Court will not consider any evidence about how IDEM reached that decision.